

Illinois Highway and Agricultural Drainage Laws

by

Carroll J. W. Drablos

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UNIVERSITY OF ILLINOIS BULLETIN

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ABSTRACT

The purpose of this study was to compile and analyze existing Illinois laws relating to highway and agricultural drainage and assemble this information into a single source.

Drainage law is derived mainly from two sources: (a) common and (b) statutory law. Common law, the body of principles that develop from long usage and custom, receives judicial recognition and sanction through repeated application. These principles develop independently of any legislative act and are embodied in the decisions of the courts. This type of law provides a large and important segment of the drainage law since it generally applies to adjoining areas having sufficient differences in elevation to cause natural drainage. Statutory laws of drainage are enacted by the General Assembly and apply to areas where drainage cannot be obtained under the rules of common law. This type of law is derived from constitutions, statutes, ordinances, and codes.

A very important part of this study is the bibliography. The authors do not pretend that all cases have been included in this report. However, if further information is desired on a particular point, the cited case in the report may be referred to in *Shepard's Illinois Citations*, which lists other cases and sources of material relating to the point in question.

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CONTENTS

I. OBJECTIVES OF STUDY	9
II. HISTORICAL REVIEW	10
A. Common-Law Drainage	10
B. Theory of the Common-Law Drainage Rules	10
C. Illinois' Adoption of Natural Drainage Rule	11
D. Early Attempts at Collective Action	11
E. Statutory Enlargement of Natural Drainage Rule	12
F. Statutory Drainage Law	13
G. Summary	14
III. NATURAL DRAINAGE	15
A. Basic Principles of Natural Drainage	15
B. Legal Classification of Water	15
C. Watercourse	16
D. Water Movements	18
E. Acceleration	21
F. Diversion	24
G. Drainage of Ponded Areas	26
H. Obstruction	28
I. Overflow	29
J. Easement	30
IV. STATUTORY DRAINAGE	33
A. Highway Authority	33
B. Drainage Districts	37
C. Individual Landowner	40
D. Extension of Covered Drain Through Land of Others	41
E. Drains and Levees for Mutual Benefit	43
V. BRIDGES AND CULVERTS	48
A. Construction	48
B. Maintenance	50
C. Liabilities	51
D. Private Bridges and Culverts	52
VI. SEWAGE AND POLLUTION	53
A. Equitable Jurisdiction in Pollution Cases	53
B. Criminal Jurisdiction in Pollution Cases	54
VII. LEGAL REMEDIES	56
A. Damages	56
B. Injunction	57
C. Limitations on Granting of Damages and Injunction	58
VIII. REFERENCES CITED	59
IX. INDEX	71

GLOSSARY

1. **Acquiescence** Conduct recognizing the existence of a transaction and intended, in some extent at least, to carry the transaction, or permit it to be carried, into effect. It is some act, not deliberately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing, and intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it. Thus it differs from "confirmation," which implies a deliberate act intended to renew and ratify a transaction known to be voidable.
2. **Artificial Watercourse** Watercourses generally owing their origin to acts of man. Examples are canals, drainage ditches, and subsurface drains.
3. **Basin** A natural or artificially created space or structure which is capable, by reason of its shape and the character of its confining material, of holding water. The surface area within a given watershed.
4. **Common-Enemy Rule** Surface water is a common enemy, and a landowner may lawfully protect his land from surface water flowing upon it from adjoining higher lands. Under this rule, the owner of high lands cannot improve natural channels or construct artificial channels on his own land, if by so doing he casts the surface water upon his neighbor to his injury, unless he secures an easement from his neighbor.
5. **Common Law** The body of principles which developed from immemorial usage and custom and which receive judicial recognition and sanction through repeated application. These principles develop independently of any legislative act and are embodied in the decisions of the courts.
6. **Condemnation** A legal proceeding to secure land for a public purpose upon payment of the land's reasonable value. Condemnation proceedings are used when the owner will not voluntarily convey title. Eminent domain proceedings are condemnation proceedings.
7. **Dicta** An observation or remark made by a judge concerning a question raised by the case but not necessarily involved in the case or essential to its determination.
8. **Ditch** An artificially constructed open drain or a natural drain which has been artificially improved.
9. **Diversion** The deflection of surface waters or stream waters so that they discharge into a watercourse to which they are not naturally tributary.
10. **Dominant Estate or Tenement** That to which a servitude or easement is due, or for the benefit of which it exists. The term is used in relating to servitudes, meaning the tenement or subject in favor of which the service is constituted, as the tenement over which the servitude extends is called the "servient tenement."
11. **Dominant Land** Property so situated that its owners have rights on adjacent property, such as a right-of-way, or a right of natural drainage. (The adjacent land is called the servient land.)
12. **Drain** Any ditch, watercourse, or conduit, whether open, covered, or enclosed, natural or artificial, or partly natural and partly artificial, by which waters coming or falling upon lands are carried away.
13. **Drainage Structures** Those structures other than drains, levees, and pumping plants which are intended to promote or aid drainage. Such structures may be independent of other drainage work or may be a part of or incidental to such work. The term includes, but is not restricted to, catch-basins, bulkheads, spillways, flumes, drop-boxes, pipe outlets, junction boxes, and structures, the primary purpose of which is to prevent the erosion of soil into a drain.
14. **Drainage System** The system by which lands are drained or protected from overflow, or both,

which includes drains, drainage structures, levees, and pumping plants.

15. **Easement** An interest in the land of another which gives to the owner of the easement a right to use the other's land for special purposes not inconsistent with the general property rights of the other, for example, the right to the flow of water across a neighbor's land.
16. **Eminent Domain** The power of the state to take private property for public use.
17. **Equity** A system of jurisprudence administered by courts of equity as opposed to courts of law. Equity jurisdiction operates in circumstances where the generality, rigidity, and inflexibility of law do not permit a court of law to provide an adequate remedy. Among the most important of the remedies granted by a court of equity is the injunction.
18. **Heritage** Every species of immovables which can be the subject of property, such as lands, houses, orchards, woods, marshes, ponds, etc., in whatever mode they may have been acquired, either by descent or purchase.
19. **Highway** Any public way for vehicular travel which has been laid out in pursuance of any law of this State or of the Territory of Illinois, or which has been established by dedication or used by the public as a highway for 15 years, or which has been or may be laid out and connects a subdivision or plotted land with a public highway and which has been dedicated for the use of the owners of the land included in the subdivision or plotted land where there has been an acceptance and use under such dedication by such owners, and which has not been vacated in pursuance of law. The term highway includes right-of-ways, bridges, drainage structures, signs, guardrails, protective structures, and all other structures and appurtenances necessary or convenient for vehicular traffic. A highway in a rural area may be called a road, while a highway in a municipal area may be called a street.
20. **Highway Authority** The department with respect to a state highway; the county board with respect to a county highway or a county unit district road if a discretionary function is involved and the county superintendent of highways if a ministerial function is involved; the highway commissioner with respect to a township or district road not in a county unit road district; or the corporate authorities of a municipality with respect to a municipal street.
21. **Injunction** A judicial order requiring the person to whom it is directed to do or refrain from doing a particular act. When the injunction commands the performance of a positive act, it is termed "mandatory."
22. **Landowner** The owner of real property, including an owner of an undivided interest, a life tenant, a remainderman, and a trustee under an active trust, but not including a mortgagee, a trustee under a trust deed in the nature of a mortgage, a lien holder, or a lessee.
23. **Natural Drainage Rule** Where two adjoining pieces of land are so situated that one is dominant and the other servient, the dominant landowner has the right to have water flow naturally from his land to that of the servient landowner.
24. **Natural Watercourse** If the conformation of land is such that it gives water a fixed and determinate course and discharges it uniformly upon the servient tract at a fixed and definite point, the course followed by the water in its flow is a watercourse.
25. **Parol** Oral or verbal.
26. **Prescriptive Rights** An easement of drainage through a ditch, drain, or culvert to or across the land of another. In order to acquire this right, there must be an open, adverse, and uninterrupted use of the drainage facility under a claim of right for the required time.
27. **Proprietor** An owner or a person who has legal title or exclusive right to some property, whether in possession or not.
28. **Quasi-Corporations** Organizations resembling corporations; municipal societies or similar bodies which, though not true corporations in all respects, are yet recognized, by statutes or immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced and privileges which may be maintained by suits at law. They may be considered *quasi*-corporations, with limited powers, co-extensive with the duties imposed upon them by statute or usage, but restrained from a general use of the authority which belongs to those metaphysical persons by the common law.

29. **Servient Land** If two adjoining pieces of land are so situated that one piece is at a lower elevation than the other, the lower piece of land is considered to be servient.
30. **Servient Tenement** An estate in respect of which a service is owing, as the dominant tenement is that to which the service is due.
31. **Statute of Limitations** An act of the legislature that sets a period of time within which a legal action must be brought. In the case of interests in land, the period is usually twenty years from the time the right to sue first arose. The effect of the statute is to make the wrong doer immune from suit after the term has expired.
32. **Statutory Law** Laws enacted by the General Assembly to either enlarge or change the common law.
33. **Surface Water** Waters which fall on the land from the skies or arise in springs and diffuse themselves over the surface of the ground, following no defined course or channel and not gathering into or forming any more definite body of water than a mere bog or marsh, and are lost by being diffused over the ground through percolation, evaporation, or natural drainage.
34. **Writ of Mandamus** A writ which issues from a court of superior jurisdiction and is directed to a private or municipal corporation, or any of its officers, or to an executive, administrative, or judicial officer, or to an inferior court, commanding the performance of a particular act

therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived.

SOURCE OF DEFINITIONS

American Jurisprudence (Legal Encyclopedia — Vol. 1-58). San Francisco: Bancraft-Whitney Co.; New York: The Lawyers Cooperative Publishing Co., 1936-1948.

H. C. Black. *Black's Law Dictionary*. St. Paul, Minn.: West Publishing Co., 4th ed., 1951.

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Illinois Revised Statutes 1961 (State Bar Association Edition). Chicago: Burdette Smith Co., 1961.

I. OBJECTIVES OF STUDY

A certain amount of confusion and misunderstanding exists concerning the application of drainage laws and practices to highway and agricultural lands. The legislature has enacted statutory laws with respect to the general subject of drainage, and courts have made decisions interpreting the statutory laws for specific cases. Until now the basic points of law and their application to highway and agricultural drainage have not been assembled into a single source of material. Therefore, misunderstandings arise because of the incoherency of information relating to the treatment of mutual problems of highway and agricultural drainage. The problems are bilateral, and each of the involved parties has responsibilities that must be accepted before satisfactory agreements can be reached.

It is generally recognized that the Illinois drainage laws should provide protection to all parties, but often there is only a limited knowledge of the real implications of these laws. Thus the involved parties are inclined to engage in objections, complaints, and litigations that might be prevented if the basic principles of highway and agricultural drainage law were better understood.

Because the Illinois Division of Highways and others have become aware of the growing importance of these problems, a cooperative investigation was initiated with funds supplied in part by the Bureau of Public Roads, the Illinois Division of Highways, and the University of Illinois. The Agricultural Engineering Department at the University of Illinois was given the responsibility for

conducting the study. It is expected that the results of this study will provide a means for handling controversial drainage problems more effectively for the benefit of all concerned.

The objective of this study was to compile and analyze existing Illinois laws that apply to highway and agricultural drainage. Since there is a certain amount of interdependence between subject matter and parties involved in highway and agricultural drainage, considerable thought was given to the most logical manner of making the study. One method was to outline the subject matter and then cover the duties and responsibilities of all interested parties under each subject. Another method was to determine the interested parties and then discuss their duties and responsibilities as to subject matter.

Further analysis showed that with either of these two methods there would be a considerable amount of duplication. Therefore it was considered advantageous to discuss the main body of the study in terms of natural and statutory drainage and to add smaller sections to include miscellaneous topics not previously covered.

Natural drainage includes all phases of drainage where water naturally flows from the dominant to the servient estate. This includes artificial drains constructed within the premises of individual dominant landowners and discharging into a natural outlet prior to its departure onto the servient land. Statutory drainage includes all other types of drainage where the rules of natural drainage do not apply.

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II. HISTORICAL REVIEW

Drainage law in Illinois is determined by two bodies of rules, common and statutory law. These two sets of rules are neither independent nor conflicting and, when taken together, form a comprehensive body of law systematically providing for drainage.

In general, the common-law rules of drainage predominate unless they have been enlarged or superseded by statutory law. In most instances where statutory provisions have been enacted, it is possible to determine the intent of the law. If, however, there is a lack of clarity in the statute, the point in question may have been litigated for clarification. In the absence of both clarity of the statute and litigation, a definite statement of the law is not possible, although the factors that are likely to be controlling may be indicated.

A. COMMON-LAW DRAINAGE

The term common law, as distinguished from statutory law, refers to the body of rules that have originated through custom and usage and have been adopted through repeated application by the courts. Through usage, the rules have become precedent and are known as the doctrine of *stare decisis*. The term *stare decisis* refers to the concept that once a court has laid down a principle of law applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where facts are substantially the same.^{(1)*}

Under the system of common law, two opposing rules regarding the drainage of surface waters have developed. The titles given to the two principal rules have created confusion surrounding their origin and development.

The two rules are known as the civil law (or natural-drainage rule) and the common law (or common-enemy rule). The rule that has been adopted by any given state is the "common law" of that state in the sense that it is the one adopted and repeatedly applied. It is unfortunate that one of the two surface water drainage rules was called

the common-law rule in view of the fact that legal writers doubt whether that particular rule was ever the law of England.⁽²⁾ To avoid confusion, these two rules will be called the common-enemy rule and the natural-drainage rule.

B. THEORY OF THE COMMON-LAW DRAINAGE RULES

In tracing the development of the two opposing rules relating to the drainage of surface waters, it is necessary to state the two basic rules and then point out the differences between their underlying theories:

[The basic rule of natural drainage is that,] as between the owners of higher and lower ground, the upper proprietor has an easement to have surface water flow naturally from his land onto the land of the lower proprietor, and that the lower proprietor has not the right to obstruct its flow and cast the water back on the land above.⁽³⁾

[The basis of the common-enemy rule is that surface water is] a common enemy which every proprietor may fight as he deems best, regardless of its effect on other proprietors; . . . the lower proprietor may take any measures necessary for the protection or improvement of his property, although the result is to throw the water back on the land of [the upper proprietor].⁽⁴⁾

The theory of the natural-drainage rule for deposition of surface water is to require the maintenance of natural drainage rather than to permit each possessor to handle the surface water problem as he deems most advantageous. This in effect is judicial enforcement of physical law. Two maxims are often quoted as justification for the theory: *aqua currit et debet currere, ut currere solebat* (water runs, and ought to run, as it has used to run) and *sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another).

The natural-drainage rule is traceable to the continental civil law. Domat's work, *The Civil Law in Its Natural Order*,⁽⁵⁾ was a seventeenth century attempt to set down the then existing civil law of France as it had been adapted from the old Roman Law. At this time Domat stated the natural-drainage rule as follows:

* Superscript numbers in parenthesis refer to Section VIII — References Cited.

If rain-water or other waters have their course regulated from one ground to another, whether it be by nature of the place, or by some regulation, or by a title, or by an ancient possession, the proprietors of the said grounds cannot innovate any thing as to the ancient course of the waters. Thus, he who has the upper grounds cannot change the course of the water, either by turning it some other way, or rendering it more rapid, or making any other changes in it to the prejudice of the owner of the lower grounds. Neither can he who has the lower estate do anything that may hinder his grounds from receiving the water which they ought to receive, and that in the manner which has been regulated.

It is to be noted that the words "have their course regulated" imply something more than diffused water merely finding its way from higher to lower ground without a definite course. Later statements of the law found in the French Civil Code of 1804 (also called Code Napoleon) and the Louisiana Civil Code purport to be the same rule but are actually broader than that stated by Domat. Louisiana's Civil Code reads:

It is a servitude due by the estate situated below to receive the water which runs naturally from the estate situated above, provided the industry of man has not been used to create that servitude.⁽⁶⁾

The American jurisdictions which have adopted the rule of natural drainage have taken this statement of the rule rather than the true statement of Domat.⁽⁷⁾ This, then, is the natural drainage rule as it exists in the United States today, having been introduced into the country in 1812 by Louisiana.

The common-enemy rule is of more recent origin. The first statement of the rule appears in an 1865 Massachusetts case,⁽⁸⁾ indicating that the rule is of American origin and not of English common law. Under the theory of the common-enemy rule, a possessor of land has an unlimited and unrestricted legal privilege to deal with the surface water on his land as he pleases, regardless of the harm that may be incurred by others. The maxim justifying this theory is *cujus est solum, ejus est usque ad coelum* (whose is the soil, his also it is up to the sky).

A third rule of surface water drainage, known as the rule of reasonable use, should be mentioned although it is not widely applied. Under this rule, each possessor is legally privileged to make reasonable use of his land even though the flow of surface waters is altered thereby and causes harm to others. The landowner incurs liability only when his interference with the flow of surface water is unreasonable. Two states, Minnesota and New Hampshire,

claim to use this rule as a modification of the two basic rules.⁽⁹⁾

Most states have adopted one of these rules to be followed as their common-law doctrine.⁽¹⁰⁾

C. ILLINOIS' ADOPTION OF NATURAL DRAINAGE RULE

Since it was well into the nineteenth century before Illinois became thickly settled, drainage law did not develop at an early date. As land use intensified and land values increased, drainage problems became more apparent. Consequently litigation and legislation establishing some type of drainage rule was necessary to solve some of the acute problems.

Illinois numbered itself among the states adhering to the natural-drainage rule. This rule was adopted in *Gillham v. Madison County R.R.*⁽¹¹⁾ in 1869 where the court held:

[A] person cannot, by an embankment or other artificial means, obstruct the water in its natural flow, and thus throw it back upon the upper proprietor.

Another case the same year again provided the court with an opportunity to invoke the natural-drainage rule. In *Gormley v. Sanford*,⁽¹²⁾ the court justified the rule by explaining:

The right of the owner of the superior heritage to drainage is based simply on the principle that nature has ordained such drainage, and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature.

As water must flow, and some rule in regard to it must be established where land is held under the artificial titles created by human law, there can clearly be no other rule at once so equitable and so easy of application as that which enforces natural laws. There is no surprise or hardship in this, for each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land.

D. EARLY ATTEMPTS AT COLLECTIVE ACTION

The inadequacies of the natural drainage rule were recognized at an early date, although the rule was not statutorily enlarged until 1885 and 1889. In the period leading up to 1870, which marks the turning point in effective drainage legislation, three parallel attempts to provide adequate drainage were made in the form of collective action. The three forms of action were (a) utilization of private chartered drainage companies, (b) procedure under the Swamp Land Act of 1850, and (c) drainage by

existing governmental units. Between 1818 and 1869 the General Assembly passed some 48 acts in these areas. The nature of these three collective actions and their effectiveness will be examined briefly.

The Constitutions of both 1818 and 1848 gave the General Assembly the power to grant private charters for various purposes, including drainage. In general, these charters were granted to enterprising citizens who made application to the General Assembly. Apparently there were hundreds of these ventures which, although successful in theory, seldom accomplished any actual results.⁽¹³⁾ The legislature expanded the powers granted to the private corporations until in one case the corporation was made a taxing unit. The property owners had no voice in the taxing procedure, and the corporation members had the right to name their own successors.⁽¹⁴⁾ Before holding that these powers granted to the corporation were unconstitutional, the court commented that the mere statement of the substance of the extraordinary legislation would seem almost sufficient in itself for a disposition of the case. The court held:

Without expressing an opinion as to the power of the legislature, itself, directly to impose a corporate tax for a corporate purpose, and without denying its power to create a district for special purposes, from portions of contiguous counties or towns, and provide for the election or appointment, in some proper mode, of public officers in such district, to be clothed with the power of levying taxes for such special purposes, we nevertheless are clearly of the opinion that this clause does forbid the legislature to grant the power of such local or corporate taxation to any other persons than the local or corporate authorities. Under our constitution, the right of taxation cannot be granted either to private persons or private corporations.⁽¹⁵⁾

This decision, plus the Constitution of 1870 prohibiting the use of private charters, ended this form of collective action.

The second form of collective action resulted from the Federal Swamp Land Act of 1850, which granted to the states all of the swamp land in need of drainage and reclamation within the state's boundaries. Land was granted in fee simple with the "suggestion" of Congress that proceeds from the sale of the land be used for drainage and reclamation. Illinois deeded the lands to the counties, originally requiring the counties to sell an amount sufficient to pay for draining the entire area, the remaining land to be granted to the townships for educational purposes.⁽¹⁶⁾ This policy was modified

by subsequent legislation until in 1859 the proceeds from the sale of such lands were made subject only to the discretion of the county court. This change of policy gave rise to litigation. Landowners who had purchased swamp land under the original policy brought suit to force the counties to use the proceeds for drainage and reclamation. These suits were not successful because the court held that state policy was a political question not subject to judicial action.⁽¹⁷⁾

Thus while large areas of land were sold under the Swamp Land Act and a considerable amount of money was realized, the drainage that was effected was negligible. Operation of the federal act in Illinois can therefore be said to have contributed only slightly to reclamation or land drainage.⁽¹⁸⁾

The third type of collective action involved the use of existing governmental organization. Apparently little is known of these efforts or of their effectiveness.⁽¹⁹⁾ It is known that in one case an attempt to substitute local taxation for state taxation was declared unconstitutional.⁽²⁰⁾ In another situation, a proposal for action by the local government was submitted to the voters and defeated.⁽²¹⁾

E. STATUTORY ENLARGEMENT OF NATURAL DRAINAGE RULE

The rule of natural drainage, as interpreted by the court, did not provide for a completely adequate system of drainage. For example, natural drainage depends upon a difference in the elevation of lands; where lands are level, the rule of natural drainage is ineffective and such lands are unprotected. Another example of inadequacy is the complete prohibition against changing in any way, cutting through, or removing a natural barrier.

The state legislature faced the problem of enlarging the rule of natural drainage to cover such situations by the enactment of statutory law. This type of legislation is readily justified. Where lands are valuable for cultivation and the country depends largely upon agriculture, the public welfare demands that an adequate system of drainage be provided. The creation of conditions favorable to the maintenance of a large and prosperous population is an object to which a government may rightfully direct its attention.⁽²²⁾

To help meet the needs of improved agriculture and sanitation, the General Assembly enacted two laws whereby, apart from drainage district organization, a landowner could improve or maintain his

drainage across the lands of another. The substance of the two statutes (essentially retained in the 1955 Code) will be discussed in later sections. The portions of those laws related to drainage are contained in Sections 4-11 of the Farm Drainage Act of 1885⁽²³⁾ and Sections 1-4 of an 1889 act concerning drains constructed by mutual license or agreement.⁽²⁴⁾ These acts substantially improved the drainage rights of landowners by enlarging the rule of natural drainage.

F. STATUTORY DRAINAGE LAW

Because of the numerous failures to achieve adequate drainage, sentiment had been aroused for a clause in the new constitution that would permit the establishment of governmental units known as drainage districts.⁽²⁵⁾ The Constitution of 1870 therefore included a clause intended to allow legislative action to provide for effective drainage. Article IV, Section 31, read:

The General Assembly may pass laws permitting the owners or occupants of land to construct drains and ditches for agricultural and sanitary purposes across the lands of others.⁽²⁶⁾

On the authority of this section, the legislature enacted the Drainage Law of 1871.⁽²⁷⁾ The procedures found necessary and expedient through various experimental attempts of earlier years were incorporated into this law. This drainage act became the subject of an important Supreme Court case in 1876. In *Updike v. Wright*,⁽²⁸⁾ the court held that the General Assembly possessed no power under the 1870 Constitution to vest commissioners or juries with authority to assess and collect taxes or special assessments for contemplated improvements. Under no circumstances could a municipal corporation (other than a city, town, or village) or private corporation be vested with the power to levy special assessments.

This decision made it impossible for the General Assembly to enact an effective law under Section 31. While the decision did not deny the power of the legislature to pass laws permitting the formation of drainage districts, it did deny the right of such districts to levy special assessments. It thus became apparent to drainage interests that the only course that lay open to them was an amendment to the Constitution. Article IV, Section 31, was therefore amended in 1878 to read:

The General Assembly may pass laws permitting the owners of lands to construct drains, ditches, and levees for agricultural, sanitary, or mining purposes, across the

lands of others, and provide for the organization of drainage districts and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches, and levees heretofore constructed under the laws of this State, by special assessments upon the property benefited thereby.⁽²⁹⁾

Simply stated, the General Assembly was given the power to pass laws providing for the organization of drainage districts and to grant to such districts the power to construct and maintain levees and drains by special assessment. With the constitution thus amended, the General Assembly passed two distinct and separate drainage laws in 1879. The underlying purpose of both acts was to provide landowners with a legal entity or organization that could be used to force unwilling owners into joining the district. Both acts embodied the same general provisions as those contained in the Drainage Law of 1871.

Each act was intended to serve a distinct drainage need. The Levee Act of 1879⁽³⁰⁾ was intended to provide districts that would offer flood and high-water protection by constructing projects of considerable magnitude. The Farm Drainage Act of 1879⁽³¹⁾ (subsequently codified and known as the Farm Drainage Act of 1885)⁽³²⁾ was intended to provide districts that would drain, rather than protect, the lands within the district.

Although two separate drainage laws appeared to be justifiable at the time of their enactment, by 1920 the legal difficulties created by repeated litigation and legislation raised questions concerning the adequacy of the acts. Increased dissatisfaction created agitation toward codification of the laws. In 1941 the Illinois Tax Commission reported:

The confusion in legal provisions resulting from this original division of drainage law into two major and several minor sets of procedure has grown with each passing year. In spite of the original difference in the type of drainage intended to be provided by the districts organized under each act, there is little or no legal distinction in purpose. . . .

Amendments to the statutes have been numerous and complicated, sometimes involving enactment, repeal, and re-enactment in addition to various changes. Much of the legislation and many of the amendments were passed for a particular drainage district which desired to perform a certain act or had already performed it and needed validating legislation. Because of the court decisions declaring drainage districts unconstitutional prior to the amendment of 1878 and several subsequent decisions interpreting the law and invalidating prior assessments and operations, the statutes are cluttered with validating clauses of no present significance.

Much of the drainage legal code is now found in court

cases rather than in the statutory provisions themselves. In interpreting this court law, continual reference must be made to the statute, since subsequent amendments may have rendered particular court decisions meaningless. Moreover, because of the numerous procedures depending upon the type of organization of the district involved in a given case, it is not always clear to which type or types of districts a particular interpretation applies. The ruling of the court in one case might not hold for other types of districts.

Because of this legal confusion, drainage district procedure is unnecessarily complicated and expensive. This has hampered the real function of the laws, which is to make possible the drainage and flood protection of farm lands by cooperative effort. Codification and clarification are imperative.⁽³³⁾

The existing situation was summed up in these words:

The practice of drainage law in the state of Illinois has become almost the work of a specialist. There is so much confusion in the decisions; there have been so many changes in the statute law and there are so many intricate, involved forms of procedure that unquestionably the drainage of lands in this State has been impeded by the legal difficulties.⁽³⁴⁾

In 1950 the Section on Drainage and Levee Law of the Illinois State Bar Association began working on a solution to the existing confusion. The result of this group's work was the 1955 Drainage Code (Ch. 42 of the Illinois Revised Statutes). The code is not a mere codification of existing law, but rather a complete revision of all drainage statutes. While it retains the essentials of the two 1879 acts, the extreme confusion has been eliminated.

The Drainage Code, however, is not the sole source of statutory drainage law in Illinois. The 1959 Highway Code supplies additional drainage provisions. This code allows the highway authorities of the state to secure adequate drainage for Illinois' highways. It also specifies the rights and

duties of adjoining landowners, apart from natural drainage, in regard to drainage onto the highway. Finally, it in part deals with the relationship between highway authorities and drainage districts.

The history of the Highway Code (Ch. 121 of the Illinois Revised Statutes) is comparatively simple. Principal highway laws were enacted in 1879⁽³⁵⁾ and 1883.⁽³⁶⁾ A major revision was made in 1913, when all prior laws were repealed and a new law was enacted embodying all highway provisions.⁽³⁷⁾ This law was amended and supplemented until 1959, when the most recent codification was enacted. The 1959 law, as the 1913 law had, repealed the existing highway law and became the source of highway regulation.

G. SUMMARY

Drainage law in Illinois consists of two bodies of law, common law and statutory law. The common-law rule adopted by the state of Illinois as determinative of surface water drainage rights is the rule of natural drainage. In the absence of statute, this rule prevails; if enlarged or superseded by statutory law, the statute is deciding.

Of particular importance to this study is the drainage law as it pertains to the highways of Illinois. For present introductory purposes it may be stated that the highway authorities of Illinois are generally treated as any other landowner.⁽³⁸⁾ The highway authority is therefore subject to the rule of natural drainage and to the 1955 Drainage Code. In addition, the 1959 Highway Code contains statutory provisions that affect the drainage of highways and the relationships between highway authorities, individual landowners, and drainage districts.

III. NATURAL DRAINAGE

A. BASIC PRINCIPLES OF NATURAL DRAINAGE

A very important part of the drainage law in Illinois is contained in the decisions of our courts. These decisions established the rights of natural drainage long before any statutes were enacted by the legislature, and they have formulated much of the present-day natural drainage policy.

Under the rule of natural drainage as adopted by the Illinois Supreme Court, the right of drainage is governed by the law of nature.⁽³⁹⁾ The courts have stated that:

The right of the owner of the superior heritage to drainage is based simply on the principle that nature has ordained such drainage, and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature. As water must flow, and some rule in regard to it must be established where land as held under artificial titles created by human law, there can clearly be no other rule at once so equitable and so easy of application as that which enforces natural laws. There is no surprise or hardship in this, for each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land.⁽⁴⁰⁾

It has been further stated that natural drainage is necessary to render land fit for the habitation and use of man. "The streams are the great natural sewers through which surface waters escape to the sea, and the natural depressions in the land are the drains leading to the streams."⁽⁴¹⁾

The principles of natural drainage apply when one piece of land is so located that it is at a higher elevation than the adjoining land and thereby allows water to flow from the higher to lower estate. Such natural flow may consist of either surface water derived from rain or snow falling upon the dominant field, or of water in some natural water-course fed by remote springs, or rising in a spring upon the dominant field itself.⁽⁴²⁾

In respect to the rights and burdens of drainage, individuals hold their ownership of land in accordance with the natural conformation of the ground. Therefore, the right of the owner of the dominant heritage to drain upon and over the servient heri-

tage is based wholly on the principle that nature has ordained such drainage.⁽⁴³⁾

However, if adjacent lands owned by different proprietors are upon a common level, there being no natural drainage from one to the other by a surface channel, the land of neither proprietor will occupy the position of servient heritage. Under these circumstances there is no right at common law to cast water onto adjoining land or to dig a ditch through adjoining land⁽⁴⁴⁾ even though for lack of drainage both parcels may be rendered useless.⁽⁴⁵⁾

The right to drain upon or over lower or servient lands without making compensation for such privilege is the same whether the dominant land is the farm of an individual owner or is a public highway.⁽⁴⁶⁾ The courts have indicated that the same rules apply to both road and farm drainage, since one is fully as important as the other.⁽⁴⁷⁾ Therefore highway authorities have a right to have surface waters, falling or coming naturally upon the highway, pass off through the natural and usual channels or outlets upon and over lower lands. Also they have the right to construct ditches or drains for the purpose of conducting surface and impounded water contained on the highway right-of-way into a natural and usual channel or outlet, even if the water thus carried upon lower lands is increased.⁽⁴⁸⁾

In this discussion, a distinction will be made as follows between natural and statutory drainage: (a) natural drainage will encompass all types of drainage that naturally occur between the dominant and servient land and will include artificial drains that aid natural drainage and that are constructed within the premises of the dominant tenement; (b) statutory drainage will refer to artificial systems built under the provisions of statute.

B. LEGAL CLASSIFICATION OF WATER

1. Categories

Water generally moves from the dominant to the servient heritage in one of the following ways:

(1) channel waters, (2) surface waters, (3) flood waters, and (4) percolating waters.

2. Relationship

In Illinois there appears to be no distinction in application of the rule of natural drainage between channel, surface, and flood waters. The rule of natural drainage as first announced in *Gillham v. Madison County R.R.*⁽⁴⁹⁾ is usually stated as follows:

[W]here the two fields adjoin, and one is lower than the other, . . . the owner of the upper field has a natural easement, as it is called, to have the water that falls upon his own land flow off the same upon the field below, which is charged with a corresponding servitude in the nature of dominant and servient tenements. . . . [T]he owner of the lower ground has no right to erect embankments whereby the natural flow of the waters from the upper ground shall be stopped; nor has the owner of the upper ground any right to make excavations or drains by which the flow is directed from its natural channel, and a new channel made on the lower ground, nor can he collect into one channel waters usually flowing off into his neighbor's fields by several channels and thus increase the wash upon the lower fields.

The courts have indicated that surface waters are governed by the rule applicable to waters flowing in a natural channel. The reason and basis of this rule is stated in *Gormley v. Sanford*:⁽⁵⁰⁾

In our judgment, the reasoning which leads to the rule forbidding the owner of a field to overflow an adjoining field by obstructing a natural water course, fed by remote springs, applies, with equal force, to the obstruction of a natural channel through which the surface waters, derived from the rain or snow falling on such field, are wont to flow. What difference does it make, in principle, whether the water comes directly upon the field from the clouds above, or has fallen upon remote hills, and comes thence in a running stream upon the surface, or rises in a spring upon the upper field and flows upon the lower? The cases asserting a different rule for surface waters and running streams, furnish no satisfactory reason for the distinction. . . . The right of the owner of the superior heritage to drainage is based simply on the principle that nature has ordained such drainage, and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature. As water must flow, and some rule in regard to it must be established where land is held under the artificial titles created by human law, there can clearly be no other rule at once so equitable and so easy of application as that which enforces natural laws. There is no surprise of hardship in this, for each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land.

The question of whether or not the same rule is applicable to flood waters was first considered by

the Supreme Court in the case of *Pinkstaff v. Steffy*:⁽⁵¹⁾

It might with equal force be inquired here what difference it can make, in principle, whether the water that submerges the land of Steffy comes from the hills above the land or comes from the overflow of a stream along the same. We are unable to see either the distinction or the ground for one. Both are natural consequences. Both are burdens cast upon the adjacent lands by the laws of nature, and as applied to such creeks and streams as the one in question we have no doubt that the correct rule is "that waters which have overflowed the banks of a stream in times of freshet, in consequence of the insufficiency of the natural channel to hold them and carry them off, are surface waters, within the meaning of the rules of law relative to such waters."

There has been some question concerning the application of the rules of natural drainage to intermittent as well as continuous flowing channels. It has been held in Illinois that the same rule is applied to surface water flowing in a regular channel that is applied to a watercourse continuously or usually flowing in a particular direction.⁽⁵²⁾

The fourth type of water is percolating water. This is the type of water that passes through the ground beneath the earth's surface without a definite channel.⁽⁵³⁾ Percolating water is part of the land itself and belongs absolutely to the owner of the land. The landowner, in the absence of any grant, may intercept or impede such underground percolation even though there may be interference with the source of supply of springs and wells on adjoining premises.⁽⁵⁴⁾

The rules of natural drainage apply to channel, surface, and flood waters, and they will be treated together in this report under surface water, since we are primarily concerned with drainage. There are some variations in the Civil Law Rule as applied to surface and channel waters relative to riparian rights, but again the concern is with the use of the water rather than drainage and therefore will not be considered in this report.

C. WATERCOURSE

1. Natural Watercourse

A watercourse, according to the ordinary significance of the term, must be a stream flowing in a particular direction and in a definite channel, and it usually discharges into some other stream or body of water.⁽⁵⁵⁾ A natural watercourse is one whose origin is the result of the forces of nature. An artificial watercourse generally owes its origin to acts of man and includes drainage ditches, canals, etc.

Many natural watercourses have been widened, deepened, or straightened, and these alterations do not change the classification of the watercourse from natural to artificial.⁽⁵⁶⁾

Illinois' courts have enlarged the basic definition of a watercourse when the term is applied to the drainage of surface water:

If the conformation of the land is such as to give to the surface water flowing from one tract to the other a fixed and determinate course, so as to uniformly discharge it upon the servient tract at a fixed and definite point, the course thus uniformly followed by the water in its flow is a watercourse. . . .⁽⁵⁷⁾

The same court went on to explain that it is probable that such a watercourse can exist only where there is a ravine, swale, or depression of greater or lesser depth, extending from one tract onto the other and so situated as to gather up the surface water falling upon the dominant tract and conduct it along a defined channel to a definite point of discharge upon the servient tract. The court also mentioned that it does not seem to be important that the force of the water flowing from one tract to another has not been sufficient to make a channel having definite and well-marked sides or banks. Therefore, if the surface water moves uniformly or habitually over a given course having reasonable limits as to width, the line of flow is, within the meaning of the law applicable to the discharge of surface water, a watercourse.⁽⁵⁸⁾ Another court held that:

[I]t is not necessary that . . . [a] watercourse should have a definite channel usually flowing in a particular direction and discharging into some other stream or body of water; but if it be surface water flowing in a regular channel it will be a sufficient watercourse.⁽⁵⁹⁾

The use of the expression "natural watercourse" or "watercourse" in conjunction with natural drainage channels has been somewhat confusing, since this terminology can apply to either riparian owners or dominant and servient owners. However, it appears that in most cases where the courts use the terms "watercourse" and "natural watercourse" in connection with the obstruction or drainage of surface waters, they are thinking of watercourses in the sense of drainways or drainage channels rather than in the sense of streams or ancient watercourses.⁽⁶⁰⁾

A slough or depression that carries water only in rainy seasons is not a watercourse within the restricted sense in which the term is used with respect to riparian rights. However, it is a watercourse

within the meaning of that term as used in the drainage laws of this state.⁽⁶¹⁾

Therefore it may safely be expressed that the term "watercourse" has come to have two distinct meanings: one when referring to a watercourse in and to which riparian rights may attach, and another when referring to a watercourse through which an upper landowner may discharge water from his land. This report will concern itself with the type of watercourse draining surface water from the upper to the lower landowner.

Past experience has shown that natural watercourses require maintenance and improvement. Therefore, the courts have held that a natural watercourse is not required to be used only in its natural state, but may be improved either by being deepened or widened by artificial means or by the construction of a drain along the course of its channel to more effectively carry the surface water off the land. The construction of such improvement does not create a substantially new watercourse, nor does it amount to an abandonment of the natural watercourse.⁽⁶²⁾

2. Artificial Watercourse

In this phase of the study an artificial watercourse will refer only to a man-made channel on the land of a single landowner. Artificial watercourses extending through the lands of two or more landowners will be discussed under the heading of statutory drainage.

There has been some feeling in the past that improvements to a natural watercourse create a new watercourse. However, the courts have held that a natural watercourse does not lose its character because it was aided by man during its creation or because part of its channel was artificially created.⁽⁶³⁾ Simply cleaning out a natural drain does not make it an artificial ditch.⁽⁶⁴⁾ Also a natural watercourse does not lose its identity by being deepened or widened by artificial means or by installation of a subsurface drain along the course of its channel.⁽⁶⁵⁾ When an individual has constructed an artificial drain on his own land for the discharge of surface waters, he is not obligated to keep the drain open for the purpose of draining the lands of others unless it is a substitute for a natural drain.⁽⁶⁶⁾

Under certain conditions, an artificial watercourse may be considered a natural watercourse. The qualifications are that the artificial water-

course must have served principally in lieu of a natural channel for the prescribed period, and must have all of the essential elements of a watercourse. Likewise, if drainage ditches have been constructed by common consent and used for the prescribed period, they become watercourses as fully as though they were not of artificial origin.⁽⁶⁷⁾

Artificial watercourses may be constructed by a landowner on his property if, in the absence of any contractual or prescriptive right, an added burden is not imposed on the property of another.⁽⁶⁸⁾

A landowner may change the direction of flow by artificial means on his land provided the water is restored to its natural or original channel before it leaves the property.⁽⁶⁹⁾ In doing so, however, the landowner must be sure that the capacity of the artificial channel will accommodate the waters handled by the natural watercourse.⁽⁷⁰⁾

The owner of a superior heritage cannot by any act acquire the right to collect surface water by artificial channels on his own land, and thus flood servient land without consent.⁽⁷¹⁾ The general public can acquire rights in an artificial ditch only by deed, prescription, or condemnation.⁽⁷²⁾

D. WATER MOVEMENTS

1. Definition of Surface Water

The type of water often referred to by the Illinois Courts in connection with natural drainage is surface water. An explicit definition of surface water has not been found in any of the Illinois decisions. However, statements from Illinois court decisions have often referred to surface water, and these statements agree with definitions contained in other references. Comparison of the quotations from Illinois decisions and other references shows that the terminology relating to surface water is similar. The following are quotations from Illinois cases:

The rule undoubtedly is, that the owner of a higher tract of land has the right to have the surface water falling or naturally coming upon his premises by rains or melting snow pass off through natural drains upon or over the lower or servient lands next adjoining. . . .⁽⁷³⁾

[The natural flow of water which the servient owner is bound not to obstruct] consists either of surface water, derived from the rain or snow falling upon the dominant field, or of the water in some natural water-course, fed by remote springs, or rising in a spring upon the dominant field itself.⁽⁷⁴⁾

These definitions are quoted from other sources:

The term 'surface water' is used in the law of waters

in reference to a distinct form or class of water which is generally defined as that which is derived from falling rain or melting snow, or which rises to the surface in springs and is diffused over the surface of the ground, while it remains in such diffused state or condition.⁽⁷⁵⁾

[S]urface waters . . . [are] those casual waters which accumulate from natural sources and which have not yet evaporated, been absorbed into the earth, or found their way into a stream or lake. The term does not comprehend waters impounded in artificial ponds, tanks or water mains.⁽⁷⁶⁾

Surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well defined channel in which it is accustomed to, and does flow with other waters, whether derived from the surface or springs; and it then becomes the running water of a stream and ceases to be surface water.⁽⁷⁷⁾

Surface waters are those which fall on the land from the skies or arise in springs and diffuse themselves over the surface of the ground, following no defined course or channel, and not gathering into or forming any more definite body of water than a mere bog or marsh, and are lost by being diffused over the ground through percolation, evaporation, or natural drainage.⁽⁷⁸⁾

[Surface waters] as the name implies, exist on the face of the earth but not contained in defined streams, channels, or basins, and the nature thereof is such that the landowner may make use thereof absolutely.⁽⁷⁹⁾

Surface waters do not lose their character by reason of flowing from the land on which they make their appearance onto lower land in obedience with the law of gravity, or by flowing into a natural basin from which they normally disappear through evaporation or percolation, or merely by being collected and absorbed by marshy or boggy land. However, surface waters cease to be surface waters when they empty into and become a part of a natural stream or lake.⁽⁸⁰⁾

The preceding definition of the term surface water implies that it is derived from falling rains or melting snows or that it rises to the surface in a spring. It also implies that surface water may be in a diffused state, either flowing naturally from the dominant to the servient land or confined in an area that has no natural drainage. It is not exactly clear when surface waters cease to be such and become part of a running stream. However, the courts in Illinois stated that they could see no reason why the same rule should not apply to surface water as to running streams or watercourses.⁽⁸¹⁾ Previous discussion indicates that the same rules of drainage should apply to the various types of water movement except percolation. With this explanation we shall make no further distinction between surface and running water.

2. Diffused Surface Water

The broad classifications encompass all water found on the surface of the ground. The first category consists of bodies of water to which riparian rights attach and includes rivers, streams, lakes, and ponds. The second category comprises all other waters on the surface of the ground,⁽⁸²⁾ which are interchangeably referred to as "surface water" or "diffused surface water." It is in this sense that surface water is defined on page 18.

Although surface water in its broadest sense refers to either surface water or diffused surface water, the two must be separated to determine the applicability of drainage rules. In this finer breakdown, surface water is limited to water flowing in a channel, regardless of how slight that channel may be. Diffused surface water (or simply diffused water), on the other hand, is water that is not confined to a channel.⁽⁸³⁾ In this discussion and in succeeding sections, the term surface water will be used in its narrow sense, i.e., water flowing in a channel.

The question arises whether the rules of natural drainage apply to diffused water as well as to surface water when the terms are broken down as shown above. Because Illinois courts have not yet answered this question, no rule can be stated. Conflicting arguments can, however, be presented.

One contention is that the rule of natural drainage is confined to surface water and does not apply to diffused water. Two Illinois authors, F. B. Leonard and H. W. Hannah, have expressed this opinion, of which the following is an example:

[W]here surface water flows from higher to lower land in natural channels or depressions, the lower owner is under a duty to receive this water and cannot dam against it, or do anything that will back such water up on the higher land. It will be noticed that this duty of the servient owner does not extend to receiving surface water flowing in a diffused state, but only to that which flows in marked channels or depressions formed by itself or by nature. These channels, however, do not have to be streams with definite banks or with a continuous flow of water.⁽⁸⁴⁾

Leonard and Hannah base their opinion primarily on two appellate cases. In *Wagner v. Chaney*,⁽⁸⁵⁾ an upper owner artificially collected diffused water and conducted it onto the lower land through a tile drain. The court held that the case did not fall within the Illinois rule that allows an upper owner to collect water and discharge it onto the lower owner through the natural channel because the facts showed that there was no such

channel. Apparently the Illinois authors interpreted the court's opinion as implying not only that the collection and discharge aspect of the natural drainage rule does not apply to diffused water, but that diffused water is completely outside the operation of the rule.

In the second case, *Bischmann v. Boehl*,⁽⁸⁶⁾ the court held that whether the water is spread out or is flowing in a channel is a question of fact for the jury. By relying on this case to support their opinions, the Illinois writers must have assumed that there would be no need to make a distinction if the same rule applied to both surface water and diffused water.

The basis for the contention that surface water and diffused water are subject to different rules is most clearly explained in Farnham's *The Law of Waters and Water Rights*.⁽⁸⁷⁾ Domat's statement of the civil law rule contains a prerequisite to application of the rule, which is that the waters must "have their course regulated from one ground to another."⁽⁸⁸⁾ The inference is that there must be more than a general diffusion of water over the ground that merely finds its way without definite course from higher to lower land. Later statements of the rule, however, were broader and did not include the regulated channel requisite. The French Civil Code of 1804 read:

The owner of the lower ground is bound to receive from the higher ground the water which naturally flows down without the human hand contributing to its course.⁽⁸⁹⁾

Louisiana's Civil Code reads:

It is a servitude due by the estate situated below to receive the water which runs naturally from the estate situated above, provided the industry of man has not been used to create that servitude.⁽⁹⁰⁾

Farnham contends that these latter sources misstate the rule and that under the true civil law rule there is no servitude unless there is a regulated course in which the water flows.

Farnham further justifies his position by claiming that, even though diffused water may flow from one piece of land to the adjoining piece, the flow at all points is uniform and the volume is not great; therefore no injury can result to the upper owner if he allows the lower owner to obstruct.⁽⁹¹⁾ Farnham's explanation of the lower owner's right to obstruct diffused water is as follows:

Water which is the result of rains or melting snow, when diffused over the face of the earth, is materially different from that which is flowing in a definite channel.

While it is in this condition most of it will percolate into the soil or evaporate before it becomes united with sufficient other water to form a stream. In this form it is not of sufficient quantity to do material harm to the land upon which it falls, even if it is compelled to remain there. When two lots subject to water in this condition adjoin each other . . . neither has a right of drainage over the other and the owner of either may make any use of his property which he chooses, regardless of the effects of his acts upon the surface water, so long as he does not collect it and cast it in a body on the other property. He may build upon his property, raise its grade, or pave it. And the fact that the lots are on a different level, so that there would be a natural flow of the water in its diffused state from one to the other, is immaterial. The owner of the lower one may, by improvements, prevent the water from flowing onto his property. . . . [S]o long as the water is spread out the neighbor is under no obligation to permit the water to flow upon his property from higher ground although the grade is such as to make the flow from one parcel to the other a natural one.⁽⁹²⁾

The contention that diffused water is not subject to the rule of natural drainage may be summarized by the following statement:

[1] With respect to water as it falls from the clouds the burden must rest where it falls so long as the water remains in a diffused state, without being gathered into any channel. In such condition, the water will ordinarily do no particular harm, and if it is necessary to obtain drainage for it, resort must be had to the aid of the state by means of public drainage proceedings. [2] While the water is in that condition any landowner may make such improvements upon his property as he chooses. He may build upon or change the surface at pleasure, without liability for the incidental effect upon adjoining property. [3] He cannot, however, by artificial means gather the water upon his property together and throw it upon the property of his neighbor, whether the grade of the latter's land is higher or lower than his.⁽⁹³⁾

A second argument is that the rule of natural drainage is applicable to diffused water. As previously noted, Domat's statement of the natural drainage rule follows the theory that water flowing from higher to lower ground in a regulated course cannot be interfered with to the prejudice of the owner of the lower ground. However, later statements of the law found in the French Civil Code of 1804 (or Code Napoleon) and the Louisiana Civil Code are broader. These two codes simply state that a possessor of lower land is not privileged to obstruct the natural flow of surface water; neither code contains a requirement that the flow be in a regulated channel. Farnham concedes that the courts which have attempted to adopt the civil law rule have actually followed these broad statements rather than the true rule.⁽⁹⁴⁾

Since the American courts have derived their concept of the civil law rule of drainage from the Code Napoleon and the Louisiana Civil Code, the argument to be made is that diffused water that passes from one landowner to another is flowing in a state of nature, even though not in a regulated channel, and therefore must be accepted by the lower owner.⁽⁹⁵⁾ Furthermore, at least one jurisdiction committed to the civil law rule has taken the position that the owner of lower land is not privileged to obstruct the natural flow of water from adjoining higher land, not only where the flow is through natural drainways, but also where it flows in a diffused state over a wide area.⁽⁹⁶⁾

Since American jurisdictions adopting the natural drainage rule have stated it in its broad form and since Illinois is among these jurisdictions, it may be argued that the rule in Illinois should be that the dominant landowner is privileged to have surface water flowing in a diffused state over his land enter the land of the servient tenement regardless of whether a discernible channel exists. This argument may be supported in at least three ways.

First, this argument finds support in the language of the Illinois Supreme Court in the case adopting the natural drainage rule:⁽⁹⁷⁾

The right of the owner of the superior heritage to drainage is based simply on the principle that nature has ordained such drainage, and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with preexisting laws and arrangements of nature.

As water must flow, and some rule in regard to it must be established where land is held under the artificial titles created by human law, there can clearly be no other rule at once so equitable and so easy of application as that which enforces natural laws. There is no surprise or hardship in this, for each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land.

The flow of diffused water is just as much ordained by nature as is the flow of surface water. Furthermore, there is no language in this opinion that expressly or impliedly excludes diffused water from the natural drainage rule.

Second, *Wagner v. Chaney*⁽⁹⁸⁾ is subject to an interpretation substantially different from that made by Leonard and Hannah. The holding of the case was simply that diffused water cannot be collected and discharged onto lower land when there is no natural channel leading from the upper land to such lower land. There is no indication, how-

ever, that the entire natural drainage rule is inapplicable to diffused water.

Third, one of the principal justifications offered by Farnham for his position that diffused water may be obstructed by the lower landowner is the contention that diffused water causes no material injury and that the upper owner is therefore not inconvenienced or injured by being forced to retain it.⁽⁹⁹⁾ The question is whether this contention is universally true; in a situation where it can be shown that retention of diffused water will substantially injure the upper owner, can the Farnham position be justified?

As previously stated, Illinois has not established its position on the applicability of the natural drainage rule to diffused water. Final determination of this question remains for future litigation.

3. Rights to Natural Flow of Surface Water

When two adjoining fields are so situated that water naturally descends from one to the other, the lower field must accept all water that naturally flows from the upper field if the dominant landowner so desires.⁽¹⁰⁰⁾ The owner of the upper field has a natural easement to have the water that falls upon his land flow onto the field below.⁽¹⁰¹⁾ Therefore, a party purchasing land over which surface water naturally flows, assumes the burden of receiving such surface water and cannot obstruct, impede, or stop such natural drainage to the injury of the owner of the superior heritage.⁽¹⁰²⁾

4. Use of a Watercourse for Draining Surface Water

It seems to be a well-established rule in Illinois that the owner of lands through which a natural watercourse flows may accumulate surface waters falling upon his lands and cast them into such watercourse. He may do so without liability, even though the flow of water is accelerated and the volume increased,⁽¹⁰³⁾ provided the natural capacity of the channel is not exceeded, causing injury to the lower owner.⁽¹⁰⁴⁾ The courts have stated that the owner of a dominant heritage may accumulate such waters by means of ditches and drains on his own land and discharge the water into the natural and usual channel or watercourse.⁽¹⁰⁵⁾ Further, such watercourse need not have a definite channel usually flowing in a particular direction and discharging into some other stream or body of water, but will be a sufficient watercourse if it contains surface water flowing in a determined course.⁽¹⁰⁶⁾

In many of the court cases, the first point in question is whether the location where the surface water is discharged is considered a natural watercourse. The courts have followed the definitions of a watercourse given in a preceding section to determine the privilege of the dominant owner to drain surface water upon the servient owner at a particular location.

The following case shows how this definition has been applied in the past. One of the parties involved was a railroad rather than a highway, but it appears that the same rule would apply to either of the two. A railroad embankment was placed across a piece of land, and the surface water from the higher ground was collected and passed through a culvert in the embankment onto the lower land. The servient landowner contended that the erection of the embankment caused surface water from above to be collected and wrongfully diverted from the natural watercourse and then allowed to run through a culvert in the embankment and spread over the lower owner's land. The court held that the culvert was placed in the exact line of a natural watercourse and the railroad had the privilege of draining the surface water from the higher land into such watercourse. The court explained that it was not necessary that there be a channel with well-defined banks. If the surface water flows along a fixed and determined course, it constitutes a watercourse into which the owner of the dominant heritage has a right to discharge surface water that flows naturally in that direction.⁽¹⁰⁷⁾

It appears to make no difference what means are used to bring water from the surrounding area to a natural watercourse. The two most common methods are surface and subsurface drains. The courts have stated that the rule of law undoubtedly is that an owner of land may empty waters into a natural watercourse by tile or open ditches.⁽¹⁰⁸⁾

E. ACCELERATION

1. Permissibility

Since drainage is concerned with removal of water from the land, the question that often arises is how fast and in what quantities it can be removed. In the first cases that arose, the Illinois courts apparently felt that the water on the dominant land could not be collected by artificial ditches and drained into natural drainways leading onto the lower land if the flow was thereby accelerated.⁽¹⁰⁹⁾ In one case the court held that the

owner of the superior heritage could not, by any act of his, acquire the right to collect the surface water upon his land by artificial channels and thus cause it to flow across his neighbor's land in larger quantities or at different times than it would naturally flow.⁽¹¹⁰⁾ This opinion was modified somewhat in a later holding:

[W]hile it is . . . proper for the owner of land to use and cultivate it according to the ordinary methods of good husbandry, although by doing so it may interfere with the natural flow of surface water in passing over his own land, so as to increase or diminish the amount that otherwise would reach the land of an adjacent proprietor and thereby cause him an injury for which the law would afford no redress, yet such owner has no right, by the construction of ditches and embankments or other artificial structures of a similar character, to collect together the surface waters from his own lands or those of other persons, and precipitate them in undue and unnatural quantities upon the lands of his neighbor to his injury.⁽¹¹¹⁾

Later cases held that the owner of the dominant heritage had the right to have surface waters pass off through natural drains upon and over the lower or servient lands. Also, the owner of the dominant heritage has the right to drain his own land into natural channels, even if the quantity of water thrown upon the adjoining lower lands is thereby increased⁽¹¹²⁾ and the flow accelerated.⁽¹¹³⁾ These rights are possibly restricted to situations where acceleration is for the sake of good husbandry.⁽¹¹⁴⁾

2. Collection

All lands lying within a natural basin may be drained into the tributary watercourse draining that basin. The lower landowners cannot object to increased flowage caused by artificial ditches constructed by the dominant owner so long as the artificial ditches drain only the natural basin.⁽¹¹⁵⁾

Therefore, the owner of the dominant estate has no legal right to collect and discharge water onto lower land if the water would not flow naturally in that direction. Furthermore, the dominant owner has no legal right, by means of drains, ditches, or otherwise, to collect even the water that would naturally flow toward the servient estate and discharge it in a body except in a natural channel or watercourse.⁽¹¹⁶⁾

The courts have held that dominant landowners have a right to discharge water over the natural surface of their lands onto the highway, with the stipulation that they do not bring water to that part of the highway that would naturally be delivered at

a different place.⁽¹¹⁷⁾ Water stored in pockets along natural depressions and watercourses can be drained along the natural course of drainage, but new excavations must not be made on the lower lands.⁽¹¹⁸⁾

In one case where the highway authority and another dominant landowner constructed a series of ditches leading to and through a natural watercourse and thus increased the volume of water on the lower landowner, the court held:

It may be true, in this case, that the construction of the highway ditch, and the ditches connecting therewith . . . have increased the volume and flow of water into the ditch on appellant's land, and that it now empties into the same with greater force than it would in a state of nature. But this cannot be avoided. It is one of the inevitable results experienced in the drainage and improvement of land, which the development of the country cannot always permit to remain in a state of nature. It has therefore frequently been held in this State, that the owners of the dominant heritage may make such drains or ditches for agricultural purposes on his own land as may be required by good husbandry, although by so doing, the flow of water may be increased in the natural channel which carries water from the upper to the lower field.⁽¹¹⁹⁾

In the case of *Kankakee & Seneca R.R. v. Horan*,⁽¹²⁰⁾ the railroad was sued for an injury to land caused by the use of too small a culvert in an embankment. Because of the insufficient size of the culvert, waters of a stream were obstructed and thereby caused flooding on an adjoining farm. One argument of the defense was that the culvert was large enough to carry off all the water of the stream before the embankment was erected, but that flowage had since been increased by the collection of water in artificial ditches on the lands of upper owners and that the railroad was not liable for such increase. The court said:

The Parker slough was a watercourse, and it was the legal right of any one along its line for miles above the railroad, where the water naturally shed toward the slough, to drain into it, and no one below, owning land along the slough, would have any legal remedy against such person so draining water into the slough above him, for any damage done to his inheritance by means of an increased flow of water caused thereby. In other words, the slough was a legal watercourse for the drainage of all the land the natural tendency of which was to cast its surplus water caused by the falling of rain and snow into it; and this, whether the flow was increased by artificial means or not.

The court decided that the railroad, in building a culvert, was bound to anticipate and provide for any such legal increase in the flow.

3. Acceleration as Required by Good Husbandry

It has been stated that the dominant landowner may accelerate the movement of water on his own land for agricultural purposes as required by good husbandry.⁽¹²¹⁾ The question then arises: what does good husbandry mean? No definite rules have been established to define this term. Leonard⁽¹²²⁾ mentioned that any improvement in the course of bona fide farming would be upheld, since farming is so important in Illinois. Leonard further thought that it would be safe to say that any legitimate farming operation would sanction an increase of the flow in natural drainage channels.

4. Injury Caused by Acceleration

A problem that the courts have not answered is whether the lower owner is entitled to any relief when he is substantially injured by the acceleration of water on the upper estate. Leonard⁽¹²³⁾ stated that:

Peck v. Herrington dealt with the question of acceleration and affirmed the right to increase the flow in the interests of good husbandry, though no limits to that rule were considered. Now such acceleration is usually a negligible affair. The natural swales or depressions can easily accommodate the excess produced by "feed ditches" on the upper tenement and within the natural basin in nine cases out of ten. So the right to acceleration should be sustained. But where that acceleration alone causes water to spread out over the lower field and injure the crops there, the interests of good husbandry on the upper estate come into conflict with the interest of good husbandry on the lower estate, and no good reason is perceived why the upper owner should be preferred. We must remember that acceleration is the work of man, not of nature. So far as drainage in a state of nature is concerned, we may say that we only recognize a servitude which nature has imposed and that therefore the lower owner takes his land with knowledge that such a burden exists. But such reasoning does not reach the case where man increases the burden below for his own benefit above. I submit, therefore, that our courts would be justified in awarding damages in such a case. It would be unwise to enjoin an upper owner from improving his land by more minute drainage there, but it would be unjust to compel the lower owner to submit to damage caused by work of the dominant owner for his own benefit solely. While no authority exists for the conclusion, it is submitted that three rules may very well be adopted when the cases come before our courts that we have been considering: (1) If the acceleration caused by the upper owner in the natural basin should be so great as to utterly destroy the lower tenement, an injunction might be granted and the upper owner compelled to condemn a drainage ditch across the lower land under the natural drainage section of the Farm Drainage Act. (2) If the acceleration did not destroy the lower estate, but did materially damage it, then an action for damages might be

allowed which would include permanent damages. If the acceleration did not materially add to the burden of the lower owner, then neither injunction nor tort action should lie. (3) It could very well include the case where the burden on the lower owner was only temporarily increased, as in the drainage of small ponds, if this were done in a careful and prudent manner.

Whether the Illinois courts would consider this argument is open to question in view of several past decisions. For example, the court held that if an ox-bow loop had been formed in the natural course of drainage upon the dominant landowner's property, the dominant landowner would be within his right to cut a ditch through the loop and discharge the water on the servient land even though this short cut greatly accelerated the flow of water. The court justified this reasoning by the following remarks:

Another objection urged to the decree with great vehemence is that it is unjust for the reason that the new ditch will carry down to the lands of appellants brush and other debris that never could reach there if the water followed the natural course. Any drain that accelerates the flow of water will increase the amount of solid matter that it carries to the servient estate, and we do not think it is a good objection to the exercise of the right of a dominant proprietor to say that the increased flow will carry debris beyond the boundary line, which would not reach there except by reason of the artificial drainage.⁽¹²⁴⁾

Another court further stated:

[I]n law there could be no damage resulting to appellee, no matter how much actual damages were suffered by him by means of an increased flow of water.⁽¹²⁵⁾

5. Acceleration of Water into Established Streams

Leonard⁽¹²⁶⁾ stated that very few cases concerned with the acceleration of water into established streams have been brought before the courts of the United States and England. He pointed out that in ninety-nine cases out of a hundred there is no objection to draining into a creek or river because the increase in volume of flowage is almost negligible. When such a stream overflows its banks, it is likely that the overflow is caused by the waters that drained naturally into the creek or stream and that artificial works on the dominant land do not make any appreciable difference.

There is one case in Illinois that deals with this problem. In *Kankakee & Seneca R.R. v. Horan*⁽¹²⁷⁾ the upper landowner artificially collected and accelerated water into a stream. The lower owner, a railroad, had previously constructed a culvert that was sufficient to carry the water flowing naturally

to the stream. However, this same culvert was not sufficient to handle additional water caused by collection and acceleration of water into the stream on the upper lands. The court stated that the lower landowner was bound to anticipate and must provide for any *legal* increase in the flow.

The question that arises is what constitutes a legal increase of the flow. Leonard⁽¹²⁸⁾ stated that:

[T]he only limitation suggested was that the "natural watershed" should be observed. Since, as we have seen, the dominant owner can drain and accelerate the flow in natural drainways, which are not streams, this limitation against cutting through a watershed seems sensible. Of course, as said before, if a watershed were cut through and some surface water were drained into a creek, the lower owners would rarely complain, but if the waters of the stream were unduly swollen by such a diversion, the upper owner would probably be enjoined or held for damages.

But assuming that the dominant owner confines his artificial, minute drainage to the natural basin drained by the stream, how much water can be cast into the stream against the objection of lower owners? All cases agree that up to the capacity of the streams no lower owner has a right to complain. It can make little difference to a riparian owner whether a stream is half full or three-fourths full; indeed, most of the litigation has been over the question of taking water from a stream rather than the question of putting more in.

But when the result of the acceleration is to produce an overflow on lower lands which would not have occurred except for the artificial drains cut in the natural basin by the upper dominant owner, there is a square conflict of authority. New York holding that no right exists under any circumstances to cause the stream thus to overflow, and North Carolina holding substantially as in the case of natural drainways that in the interests of agriculture, swamp lands may be drained into a stream if natural barriers are not cut through, even though this causes an overflow on the lands of lower riparian owners. This "license is conceded with caution and prudence."

Such being the state of the authorities, what course will our Supreme Court adopt if this question comes before it? The North Carolina rule has the merit of being easily applied, and the difficulties pointed out, in their opinion, with the application of the New York rule are not insignificant. Streams become choked with sand and sediment when land is cleared, and the question may become very vexing as to whether the artificial works of the upper owner caused an overflow below or not. Then there will be great difficulty and much injustice in fixing the blame if many riparian owners artificially drain into the stream and an overflow occurs below. But in spite of these practical difficulties, isn't there something to be said for the lower owner whose fields are flooded in order that his neighbors above may "practice good husbandry" for the general welfare? This looks a little as if we are robbing Peter to pay Paul. Moreover, so far as taking water from a stream is concerned, we have developed the general rule that the lower riparian owner has a right to

have the stream flow by his land in its natural state; and if this rule applies to the adding of water to a stream, we would have a conflict between the extended principle of *Peck v. Herrington* and this settled rule of the common law of waters. It would seem then that there is a great deal of likelihood that our Supreme Court would allow an action for damages in case of an overflow of the lower riparian owner's land was caused by artificial acceleration of the flowage of a stream. . . .

F. DIVERSION

1. Definition of Diversion

Diversion, as applied to a watercourse, is defined as a turning aside or altering of the natural course of the stream.⁽¹²⁹⁾ The term is chiefly used in law to mean the unauthorized changing of the course of a stream or drainway from the natural condition to the prejudice of a lower proprietor.

Owners of land may drain in the course of natural drainage by constructing open or covered drains and discharging them into any natural watercourse or into any natural depression provided the water will be carried into some natural watercourse.⁽¹³⁰⁾ Property owners are not authorized to drain areas in other than the course of natural drainage.⁽¹³¹⁾

2. Point of Discharge

The privilege of diverting water depends on the nature of the diversion. Diversions can be made wholly within the premises of individual landowners provided the water empties into a regular channel leading from the upper to the lower field. The courts have upheld the privilege of diversion on private property provided new artificial channels are not created on the lower lands.⁽¹³²⁾ The courts in Illinois have held that a proprietor of land may change the location of a natural watercourse within the limits of his own land if the channel is restored to the original location before the water reaches the lands of another.⁽¹³³⁾ Water must pass from the higher to lower owner at the precise point of natural drainage, and at no other location.⁽¹³⁴⁾

The dominant landowner is not permitted to cast water upon the land of an adjoining proprietor that would not reach this land in a course of natural flow. Water also cannot be emptied out of a ditch or drain into a natural channel in such quantities as will cause overflow upon the lands of another at a place where it would not naturally flow.⁽¹³⁵⁾

The law states that the flow of surface water from the dominant estate upon the servient estate

may, in the interest of good husbandry, be increased by ditches and drains. However, the natural flow in one channel cannot be diverted into another and different channel in such a way as to increase the flow from that channel upon the servient estate.⁽¹³⁶⁾ Nor can the dominant landowner collect into one channel water usually flowing onto his neighbor's fields in several channels and thus cause the water to flow in undue and unnatural quantities and injure the neighbor's lands.⁽¹³⁷⁾

3. Diversion as Related to Highway and Agricultural Drainage

The rules of diversion apply to both highway authorities and individual landowners. The courts have held that landowners have the right to accelerate the natural flow of water by means of ditches and allow it to discharge itself over the natural surface of their own lands onto the highway. This right includes accelerating the flow along natural depressions and watercourses and thereby precipitating onto lower lands water that would naturally evaporate or seep into the soil. However, landowners are not permitted to bring water to the highway that would naturally be delivered at a different place.⁽¹³⁸⁾

According to the principle of natural drainage, landowners adjoining the highway have a right to drain their lands across or along highways with or without the consent of the highway authorities provided they follow the natural depression of the surface. But when a landowner attempts to divert water and cast it upon the highway out of its natural course, highway authorities have a right to prevent such action, especially when such diversion is likely to endanger the highway by increasing the width and depth of a ditch along the highway. If a proposed drain is not a natural watercourse, the adjoining owner must obtain consent from the highway authorities.⁽¹³⁹⁾

When highway authorities undertake to drain a public highway, they possess the same rights and are governed by the same rules as adjoining landowners who undertake to drain their own lands.⁽¹⁴⁰⁾ Therefore, highway authorities must take care not to divert water from the general course of drainage⁽¹⁴¹⁾ and to keep such courses free and open, without obstruction by any work or structure upon the public highway.⁽¹⁴²⁾

Under the rules established by the courts, water accumulating in a particular part of a highway and

naturally running off in a certain channel or waterway is subject to natural drainage. Therefore all portions of the highway that lie in a position to drain naturally in a certain channel may drain in that direction. The highway authorities have no right or power to collect and carry along a highway a quantity of water that would naturally drain off in another direction and discharge such accumulated water on an adjoining landowner. Nor have the highway authorities the right to divert water from its regular channel and carry it along the line of the highway for such a distance as they may desire and then discharge that water upon the land of an individual. This action would be imposing a burden upon the landowner that the law will not tolerate.⁽¹⁴³⁾

The court has mentioned that a situation could arise in which the highway authority might, if it saw proper, divert the water along the highway from its natural flow and carry it along the line of the road, to be discharged into some large stream of water that crosses the highway. The court expressed the opinion that such an act might be allowed if the discharge of diversion water did not damage the adjoining landowner or other property owners located along such stream.⁽¹⁴⁴⁾ If such drainage did injure an adjoining owner, it could not be justified by the claim that it was necessary or was done in good faith.⁽¹⁴⁵⁾ In any event, drainage by a highway authority contrary to the direction of natural drainage would be restrained if it were solely for the benefit of landowners on the opposite side of the highway where an outlet already existed.⁽¹⁴⁶⁾

When existing channels that carry natural drainage water adjacent to the highway are eliminated by improvement to the road and subsequent damage is caused to adjoining landowners, there is good cause of action based upon the wrongful diversion of water. An example was presented in *Hargadine v. Sharkey*.⁽¹⁴⁷⁾ A highway passed over a bluff and down through a valley that contained a river. There were ditches for draining the highway and surrounding area along each side of the highway, extending from the top of the bluff to the river. The highway was improved to eliminate the channels along the roadbed carrying the water from the road and surrounding area to the river. As a result, water flowed onto the bottom area farm land from each side of the road. The court restrained the highway authority from diverting water onto ad-

joining lands and ordered it to construct adequate ditches to carry the water coming from the hill and road directly to the river. Thus action may be taken where water has been diverted in such a way as to cause damage to a landowner in a place where it would not have drained naturally.

4. Insufficient Channel

Since the right of drainage through a natural watercourse is an easement appurtenant to each tract of land through which the watercourse runs, each owner is bound to take notice of the easement possessed by other owners. Therefore, a natural watercourse cannot be changed by a servient owner to deprive upper landowners of their legal right to have the channel kept open when it would deprive them of their legal right to drainage. It has been held that an old watercourse cannot be replaced by a new channel that is not sufficient to carry the increased flow of water resulting from properly constructed artificial drainage on dominant lands and the upper landowners then required to pay for removing obstructions to such drainage.⁽¹⁴⁸⁾ It appears from this statement that an artificial channel legally being used in place of a natural drain must be of such capacity that it will adequately drain all water under the natural drainage rule.

5. Natural Barriers

The owners of higher ground are not authorized by law to remove natural barriers and thereby allow water to flow out of its natural course onto adjoining and lower lands. This action would subject the servient heritage to an unreasonable burden that the law will not permit.⁽¹⁴⁹⁾

Landowners do not have the right to divert surface waters from their natural channels and thereby cause overflow on the lands of another without making proper compensation for damages caused by such overflow. In a case where a railroad company diverted the flow of a watercourse through a natural barrier to a point where the land of another was overflowed, the railroad was held liable for damages. The court stated that the fact that such waters were first conducted into a natural watercourse leading to or through the damaged lands did not change the liability if such waters caused the natural watercourse to overflow its banks and cause damage to other landowners.⁽¹⁵⁰⁾

Another case, where two adjacent valleys were crossed by a highway, further explains this point. A small ridge between the valleys kept the water

from flowing from one valley to the other except at high water level. The water flowed naturally through the valleys across the highway onto adjoining landowners. From time to time material was excavated from the ridge in the highway ditch between the two valleys to provide added fill on the road embankment. This action continued until the ridge was lowered to the point where ponded water in one valley flowed into the other valley and then onto a different proprietor. The waters finally discharged in a basin on a plowed and cultivated field that had no outlet until the water reached the height of 12 to 14 inches. Thus the land became useless.

The court stated that the public, represented by the highway authorities, had a right to pass surface waters falling or coming naturally upon the highway through the natural and usual channel or outlet. They also had a right to construct ditches or drains to conduct surface and ponded water on the highway into natural channels even if the quantity of water thus carried upon the lower lands was thereby increased. However, the owner of the higher land was not authorized by law to dig through or remove natural barriers and thereby allow water to flow onto adjoining lower lands when it would not naturally flow in that direction. The public had no lawful right to obtain benefits by injuring the vested property rights of lower landowners.⁽¹⁵¹⁾

6. Rights of Diversion by Prescription

If the owner of the dominant estate voluntarily changes the course of natural drainage so that water ceases to flow over the servient estate without interruption for twenty years, mutual and reciprocal rights are acquired by prescription. This action exempts the dominant owner from restoring the water to its original channel and forever releases the servient estate from the burden of the original easement.⁽¹⁵²⁾

G. DRAINAGE OF PONDED AREAS

1. General

Since water descends by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement for the discharge of all waters that naturally rise in, or flow or fall upon, the superior estate. This easement in favor of the dominant heritage is not confined or limited to the discharge upon the servient estate of all water

that may flow from the dominant estate while the natural surface of the ground remains undisturbed, but extends to waters that may be collected in ponds and low and marshy areas.⁽¹⁵³⁾ Therefore, the general principles of natural drainage also apply to ponded areas.

It has been stated earlier that the owner of the dominant heritage has the right to have surface water coming upon his premises pass off through natural drains upon and over the lower or servient lands. Also, the owner of the dominant heritage has the right to drain his own land into the channels that nature has provided, even if the quantity of water thrown upon the adjoining lower lands is consequently increased. But at the same time the owner has no right to open or remove natural barriers and let onto such lower lands water that would not otherwise naturally flow in that direction.⁽¹⁵⁴⁾

2. Removal of Pond Barrier

Ponded areas are an exception to the rule concerning removal of natural barriers. A landowner has a right to remove the natural barrier surrounding a pond or series of ponds formed by the collection of surface water upon the dominant land, provided the pond is situated on a grade descending toward the lower land and the removal of such barriers will allow the water from the ponds to drain into a natural watercourse.⁽¹⁵⁵⁾

The court has indicated that ponds are generally surrounded by what properly may be called a rim. At some point on the circumference of the rim, there is usually a slight depression that allows overflow and is considered the natural outlet of the ponded area.⁽¹⁵⁶⁾ This point of discharge can be discovered if the ponded area is filled with dirt and the water is forced to overflow into the natural channel of drainage.⁽¹⁵⁷⁾ To determine the direction of natural flow from the ponded area, it is the usual and not the extraordinary overflow that is considered.⁽¹⁵⁸⁾

Therefore the owners of lands on which ponded areas exist have a lawful right to cut down the rim and deepen the depression upon their own land to entirely drain the basin at the point of lowest elevation on the rim. However, no authority exists to allow the dominant owner to cut through the rim at some place other than the lowest point and thereby drain the water upon the land of another at a point that could not be reached if the waters were to overflow naturally. As long as the drainage

carries the water along the natural course, the servient proprietor may not complain, even though natural barriers on the higher land have been cut down and the flow of water has been both accelerated and increased. "Were the rule otherwise, there would be no method by which any one owner could improve his land by the construction of ditches and drains which would carry the drainage upon another's property, because the purpose of such improvements in every instance is to hasten and increase the flow of water, and this object is only attained by the removal of natural barriers."⁽¹⁵⁹⁾

3. Manner of Conducting Water on Dominant Land

In Illinois it is recognized that the manner in which the owner of the dominant heritage conducts water over his land before it reaches the land of another does not concern the servient owner so long as the water reaches the lower lands in the same course it would have taken naturally. In instances where ponded water lies on the highway and flows naturally in an open ditch through the adjacent landowner's field, highway authorities are allowed to divert the water along the highway to an outlet so long as it is the same as the original outlet.⁽¹⁶⁰⁾

It has been held that highway authorities have a right to lay a tile through a series of depressions in a natural watercourse along the highway to drain the highway and highway right-of-way and empty the water into a more defined natural watercourse.⁽¹⁶¹⁾ In situations where a highway divides the dominant and servient land, and ponded areas develop in the highway because of imperfect drainage, the law authorizes that these ponded areas be drained in the general course of natural drainage for the benefit of the public.⁽¹⁶²⁾ It is well established that the water that accumulates in a ponded area may be drained in the direction that it will naturally flow, even though the flow upon the servient landowner may be increased.⁽¹⁶³⁾ Since the rules of natural drainage apply to highways,⁽¹⁶⁴⁾ it may be assumed that this rule applies equally.

4. Pond Size

The size of the pond that can be drained upon and over the adjoining owner is a question that has not been clearly answered. It has been established that small ponds located on the dominant estate may be drained in the general course of natural

drainage. The court has also stated that the owner of the superior estate probably has no right to destroy the land of an adjoining owner by draining a large body of water or lake.⁽¹⁶⁵⁾ In *Peck v. Herrington*,⁽¹⁶⁶⁾ the leading case on pond drainage, the court held that the dominant owner could drain the type of pond that merely collected surface water from rain and melting snow, but it implied that a "natural pond" would not come within this right.

This distinction, however, between a "natural pond" and a collection of surface water from rain and melting snow cannot be laid down as an Illinois rule because other factors aided the court in holding that the ponds in question could be drained. First, the largest pond contained only three acres. Second, these ponds made much of the land unfit for cultivation, and good husbandry required that they be drained.

Although no definite limits were placed on the maximum size of the pond that may be drained, the court stated that it might be true that the owner of the higher tract did not have the right to drain a lake or other large body of water upon the land of an adjoining owner and thus destroy it.

This point was further made in *Hicks v. Silliman*,⁽¹⁶⁷⁾ where a large pond covering about 100 acres had stood upon the tract for many years. It was a natural reservoir and receptacle for water flowing through a creek. The ponded area became substantially dry during part of the year, but when freshets or sudden heavy rains occurred it was able to impound a vast amount of water before it overflowed. Therefore drainage of this area would have caused large quantities of water that otherwise were confined to the ponded area to be thrown upon the lower land.

The upper landowner intended, by artificial means, to conduct the water from the large pond to a point on his own land near the adjacent land and thereby permit it to drain naturally upon the lower owner. The adjoining landowner objected to this action and took his case to the court. The court ruled that this water, if collected and discharged, would certainly flow upon the adjacent land in unnatural and undue quantities. It also held that in instances where the servient land was unusually low and wet, making it barely susceptible to cultivation, the court would be fully warranted in disallowing the drainage of undue amounts of surface water.

It appears from these statements that the dom-

inant landowner is entitled to drain ponded areas created by collection of surface water from rain and melting snow where such drainage is for reasons of good husbandry. But when such ponded areas are natural and large enough to overburden the lower land if drained, the dominant landowner can be restrained from draining them.

H. OBSTRUCTION

1. Illinois Rule

The courts recognize two distinct rules with respect to the right of a lower landowner to obstruct and repel surface water flowing from the lands of a higher owner. These rules, as stated earlier, are the civil law and the common law. The civil law is applied in Illinois. According to this doctrine, the owner of the dominant estate has a legal and natural easement in the servient estate. The servient landowner takes the land with the burden of receiving surface water. Therefore the upper landowner may discharge over the lower land all waters falling or accumulating on his land in a natural state. The servient owner cannot interrupt or prevent such natural flow or passage to the detriment or injury of the estate of the dominant proprietor.⁽¹⁶⁸⁾

2. Obstructing Natural Water Flow

Many of the cases concerning obstruction of natural flow have involved highways constructed across agricultural land. In the case of *Town of Bois D'Arc v. Convery*,⁽¹⁶⁹⁾ the lower landowner obstructed a natural watercourse at a point where it crossed a public highway. The upper landowner, the highway authority, petitioned the court to have the lower landowner remove such obstruction from the watercourse. The court first determined that the watercourse was natural and then held that the highway authority had the right to have the waters falling upon the highway flow off in the natural watercourse. The court further stated that if the water falling upon land on one side of a highway naturally flowed across the highway through a swale or depression onto the lands on the other side of the highway, a natural watercourse did exist even though it might not have well-defined banks and bed and the water might not flow through the swale at all times of the year. Therefore, the right remained to have the flow of water from the highway unobstructed in such instances.

In the case of *Town of Nameoki v. Buenger*,⁽¹⁷⁰⁾ under somewhat similar circumstances, a highway divided two pieces of land, one of which was higher than the other. Water drained naturally across the highway from the higher to the lower land. The lower owner built a levee across the watercourse below the highway and thereby obstructed the water coming from the higher land. This obstruction caused water to back up, making the highway muddy and swampy and the higher land unfit for cultivation. The court found that a natural watercourse existed and therefore held that the owner of the servient heritage had no right, by embankments or other artificial means, to obstruct the natural flow of the surface water from the dominant heritage and thus throw it back upon the latter.

Where water has been discharged from a culvert under a road upon the servient land for a long period, causing the elevation of the watercourse to become lower than it originally was, the lower landowner has no right to impede the present flow by an obstruction or embankment even though such obstruction is no higher than the original surface of the waterway.⁽¹⁷¹⁾ The courts have explained that it would be extremely difficult, if not impossible, to ascertain what the natural surface originally was and therefore it would be dangerous to allow the watercourse to be dammed on the assumption that the water would thereafter flow as it did naturally.⁽¹⁷²⁾ If an obstruction impairs the natural drainage of highways, a mandatory injunction may be used to compel the removal of such obstruction.⁽¹⁷³⁾

On the other hand, where an embankment has been maintained across a channel for longer than twenty years, the servient owner has a right to restore this embankment to its original height even though it has been washed out by overflow. However, the owner does not have the right to increase the height above that of the original embankment.⁽¹⁷⁴⁾

The courts have held that highway authorities have no more right to obstruct natural watercourses to the damage of landowners than do private persons. Nor can highway authorities authorize another person to do so and thereby escape responsibility for doing the wrongful act. The highway authority may drain the roads but, in so doing, must be careful to keep watercourses free and open, without obstruction by any work or structure upon the public highway.⁽¹⁷⁵⁾

Where water has been wrongfully diverted on upper land and drained into and along the highway and thereby discharged upon the land of the lower owner at a point where it would not naturally flow, the court has held that the lower owner may lawfully obstruct the wrongful flow of such waters upon his premises.⁽¹⁷⁶⁾ However, the existence of a natural obstruction on the servient land is not a violation of natural drainage by the servient owner. Therefore, "the owner of the higher land cannot compel the owner of the lower land to remove natural obstructions, such as shrubs, weeds, brushwood, cornstalks, or other crop residues, that may accumulate and impair natural drainage."⁽¹⁷⁷⁾

3. Provision for Sufficient Openings

A cause of action exists when flooding results from inadequate openings in embankments crossing watercourses. The case selected as an example concerns a railroad, but perhaps the courts would have handled the problem in a similar manner had it involved a public highway. In this case the railroad possessed a right-of-way that crossed some natural depressions through which surface water naturally flowed. An embankment constructed across the natural drainway did not have sufficient openings to allow water naturally cast upon the land above to pass through the depressions as it had in the past. Later heavy rains caused damage from flooding because of inability of the water to escape.

The court held that parties changing or restraining the flow of water must provide for the consequences of unusually heavy rainfalls and are liable for damage to the lands of others caused by failure to make such provision. The court further stated that whether the rainfall was so heavy and unprecedented that the damage from overflow might be considered an "act of God," and thus relieve the defendant from liability, is a question of fact to be determined by a jury. Also, each overflow of the lands of an adjoining owner caused by negligent or improper construction of an embankment is a fresh nuisance and creates a new cause for action.⁽¹⁷⁸⁾

I. OVERFLOW

1. Natural Flow

The rule of civil law as adopted in Illinois states that the right of drainage is governed by the law of nature and therefore the owner of the dominant heritage has a natural easement for the flow of sur-

face waters over the land of the servient owner. The servient owner cannot do anything to obstruct the natural flow of surface water and cast it back upon the land above.⁽¹⁷⁹⁾ It has been stated in Illinois that water overflowing the banks of a small stream because the natural channel is not adequate to carry off surface water comes within the law relating to natural drainage.⁽¹⁸⁰⁾ Therefore, where the natural slope is such as to make land on one side of a small stream the dominant heritage and that on the other side the servient heritage, the servient owner has no right, by embankments or other artificial means, to stop the natural flow of flood waters over his land and thus throw them back upon the dominant heritage.⁽¹⁸¹⁾

Even the interest of good husbandry does not justify construction of a levee by the servient owner to protect his land from overflow in times of flood if it interferes with the natural flow of water to the injury of the dominant owner.⁽¹⁸²⁾

The court further stated:

It might with equal force be inquired here what difference it can make, in principle, whether the water that submerges the land of Steffy [the servient landowner] comes from the hills above the land or comes from the overflow of a stream along the same. We are unable to see either the distinction or the ground for one. Both are natural consequences.⁽¹⁸³⁾

In another case the court held that a riparian owner has no right to construct an embankment or barrier along the normal bank of a stream to protect his land from overflow if it will cause the waters of the stream, in times of ordinary floods, to damage the land of other riparian owners.⁽¹⁸⁴⁾ The civil-law rule of drainage carries with it the implication that one must so use his own property as not to injure or deprive another of the right of natural drainage that the law guarantees to him.⁽¹⁸⁵⁾

Therefore, it may be concluded that where natural flow conditions exist, the servient landowner does not have the right to obstruct natural drainage and cause overflow upon the dominant estate. Nevertheless good husbandry may dictate and justify some actions concerning overflow. The landowner, in the interest of good husbandry, is entitled to maintain levees to protect crops from inundation by overflow from watercourses under the condition that no injury will be caused to others. But if a landowner benefits himself and injures another by depriving him of the enjoyment of the right of natural drainage, the plea of good husbandry is not justified.⁽¹⁸⁶⁾

Where a levee or an embankment causes a greater quantity of water to overflow upon adjoining servient land than would occur under natural conditions, the servient owner has a right to build a levee to prevent this additional water from overflowing his land. The fact that the servient owner has constructed a levee, however, does not defeat the dominant owner of the right to benefit from natural drainage over the servient land in times of flood.⁽¹⁸⁷⁾

2. Obligations of Highway Authorities and Adjoining Landowners

Adjacent landowners sometimes believe that highway authorities are obligated to drain their land and protect it from the overflow of water naturally thrown upon it. The court has held that highway authorities do not have the responsibility of providing adequate drainage to protect the adjacent landowner from the natural overflow of water.⁽¹⁸⁸⁾ Also, they cannot bind themselves by agreement to furnish drainage for areas not being overflowed to a greater extent than they originally were unless such drainage is made necessary by their acts. On the other hand, they cannot cause the land of the adjacent owners to be overflowed to a greater extent than it had been in the natural state.⁽¹⁸⁹⁾

J. EASEMENT

1. Definition

An easement is a right or privilege in the land of another that can be created by grant or prescription.⁽¹⁹⁰⁾ It is an interest in the land of another that gives the owner of the easement a right to use another person's land for special purposes not inconsistent with the general property rights of the other person.⁽¹⁹¹⁾ Generally the elements necessary for creation of a drainage easement are "a dominant tenement," to which the right belongs, and a "servient tenement," on which the obligation rests.⁽¹⁹²⁾

2. Natural Easement

The subject of natural easements was discussed earlier in this report. However, some of this information may be worth repeating to clarify other phases of easements.

The courts have established that the dominant owner has a natural easement over the land of the servient owner for the flow of surface waters.⁽¹⁹³⁾

Therefore, the servient owner cannot, by embankment or other artificial means, interfere with or divert such flow and throw the water back upon the dominant owner.⁽¹⁹⁴⁾ The relative positions of the lands directly determine natural easement rights and responsibilities, just as they are the basis for much of the natural drainage law. Other types of easements have been established to work in conjunction with natural easements in handling drainage problems most effectively for the welfare of all concerned.

3. Prescription

a. ELEMENTS OF PRESCRIPTIVE RIGHTS

The general rules governing acquisition of rights by prescription apply to certain drainage rights. Mutual and reciprocal rights can be acquired by prescription that will forever release the servient estate from the burden of the original easement.⁽¹⁹⁵⁾

In order to be applicable to the right of prescription, the lands must have been used adversely and uninterruptedly for twenty years or more.⁽¹⁹⁶⁾ These elements are essential in determining the right to prescriptive privileges. The case of *Totel v. Bonnefoy*⁽¹⁹⁷⁾ provides an illustration: An owner of land had used a particular ditch from 1861 to 1877 to drain water from his land over that of another. A new ditch was constructed nearby and was used in place of the old ditch from 1877 until sometime in 1882. The landowner brought suit to use the new ditch on the theory that he had acquired prescriptive rights since he had been draining over his neighbor's land for more than twenty years. The court held that the landowner had not acquired a prescriptive right to have the water from his land drain over the adjoining lands by way of the ditches because there was no continuous and uninterrupted use of either ditch for a period of twenty years, and that the time of use of the new ditch could not be added to the time of use of the old one to make up the prescriptive period of twenty years.

b. APPLICATION

Applicability of prescriptive rights depends upon the parties involved. Certain parties have privileges over other parties, and an understanding of these principles is important to a complete understanding of the application of prescriptive rights.

For example, in *Savoie v. Town of Bourbonnais*,⁽¹⁹⁸⁾ highway authorities purchased a strip of land that was located on the property line between

two adjoining landowners. This strip led from the highway right-of-way to a natural stream. They constructed a ditch along this strip and maintained it for forty years. This ditch collected all the water that accumulated on one side of the highway and deposited it in the natural watercourse. Later the highway authorities abandoned the ditch. As a result it became filled with debris, and water overflowed several times a year across the plaintiff's land, creating gullies, washing away topsoil, and causing irreparable damages. The plaintiff claimed his prescriptive right entitled him to force continued maintenance.

The court stated that the ditch had diverted water for more than 40 years and it appeared that the plaintiff had acquired prescriptive rights against certain individual defendants, prohibiting them from restoring the water to the original course. However, it appeared that the plaintiff was trying to force the defendant to provide continued maintenance rather than restoration of the original channel. The court therefore ruled that the defendant would not have to provide continued maintenance, since prescriptive rights merely impose a duty not to restore the original watercourse by any wrongful overt act. Since this case involved the public as defendant, there was also a factor of immunity that would not allow the use of prescriptive rights and this point will be discussed in the following section.

The court held in a similar case that where the owner of the dominant estate diverts the water from its natural course by constructing an artificial channel through which the water flows uninterruptedly for more than twenty years, other proprietors who benefit thereby are deemed to have an easement by prescription in the new watercourse and the water may not be restored to its original course.⁽¹⁹⁹⁾ This rule applies even though the affected landowners are not contiguous.⁽²⁰⁰⁾

c. IMMUNITY

The state and federal governments are generally considered immune from the application of prescriptive rights, since their actions concern the public as a whole. However, the courts have held that exemption of counties, cities, towns, and other minor municipalities from operation of the Statute of Limitations extends only to matters affecting their public rights as distinguished from private and local rights.⁽²⁰¹⁾ The courts have explained that municipal corporations, as contrasted with the state

and federal governments, may be subject to the Statute of Limitations to the same extent as private individuals.⁽²⁰²⁾ However, they do enjoy immunity in matters involving public rights.⁽²⁰³⁾

The courts have distinguished between public and private rights by holding that public rights or uses are those in which the public has an interest in common with the people, whereas private rights or uses are those which the inhabitants of a local district enjoy exclusively and in which the public has no interest.⁽²⁰⁴⁾

Although governmental bodies are generally immune from the operation of the Statute of Limitations, these bodies may nevertheless acquire rights by prescription. The courts have held that under our statute the continued and uninterrupted use of land as a highway for the statutory period, in the absence of proof to the contrary, will be presumed to have been under a claim of right and will create a prescriptive right in favor of the public without further proof of acts of recognition on the part of authorities.⁽²⁰⁵⁾ However, the private individual is not immune from the operation of the Statute of Limitations when the public is involved.

d. PAROL LICENSE

A license is an authority to perform a particular act or series of acts upon another's land without possessing any estate therein. It may be created by parol, and is generally revocable at the will of the

licensor.⁽²⁰⁶⁾ However, an agreement, though not under seal, when supported by a valuable consideration is held to create a vested right in the nature of an easement and is not revocable as is a mere license.⁽²⁰⁷⁾

4. Maintenance

So far as maintenance of the drain is concerned, it has been recognized that it is the duty of the owner of an easement to keep it in repair, and no obligation to make repairs is generally imposed upon those whose lands are thus placed in servitude.⁽²⁰⁸⁾ Ordinarily the owner of the easement has the right to go on the servient tenement to keep the drain in repair without doing unnecessary injury to the land. The court has stated that:

As a general proposition, whoever has an easement in or over another's land has the right to do all such things as are necessary to preserve the easement; that is, he may keep it in repair, and has the right of access to make the necessary repairs. . . . It would seem, therefore, that the common law annexes to the easement of a drain in another's land the right to go upon such land, and clean out or repair such drain without doing unnecessary injury to the land.⁽²⁰⁹⁾

The court has further mentioned that such an interpretation is consistent with fundamental concepts respecting property rights whereby one owning property is expected to protect those rights himself while others are expected not to invade them.⁽²¹⁰⁾

IV. STATUTORY DRAINAGE

As the preceding discussion has shown, the concept of natural drainage is founded on the relative positions of pieces of land. The discussion therefore was in terms of dominant and servient lands, regardless of what particular party occupied either position.

Drainage statutes, however, do not deal in terms of relative positions of land. Instead they deal with the rights and duties of particular parties: highway authorities, individual landowners, and drainage districts. Clarity therefore suggests that statutory drainage be discussed in terms of parties.

Before we deal with specific statutory provisions, a few general comments may be helpful:

First, rights that are non-existent at common law and that are created by statute must be strictly followed.⁽²¹¹⁾ Deviations are often fatal.⁽²¹²⁾

Second, this study does not purport to include all statutory provisions related to drainage. Basic drainage rights and duties are presented; technical prerequisites, conditions, etc., are excluded.

Third, there has been little opportunity for cases to have been litigated and reported under either the 1959 Highway Code or the 1955 Drainage Code; most cases that have been reviewed were decided under previously existing laws. The specific provisions of the codes with which this report deals, however, are basically identical to the comparable provisions of the earlier laws. Any material differences will be noted.

Finally, definition of the term "highway authority" was added in the 1959 Highway Code.⁽²¹³⁾ Until this addition, statutory sections applicable to highway authorities had specifically listed each authority. The new code has avoided these listings either by using the term "highway authority"⁽²¹⁴⁾ or by using separate sections, each of which applies to one authority.⁽²¹⁵⁾

The question arises whether rules and interpretations laid down in cases involving highway commissioners can be applied to highway authorities in general. It appears that, in general, the legislators intended the basic drainage statutes to

apply equally to all highway authorities.⁽²¹⁶⁾ The general rule seems to be that the one having jurisdiction over a particular highway must be the acting authority.⁽²¹⁷⁾

A. HIGHWAY AUTHORITY

1. Eminent Domain

The preceding chapter explained the applicability of the rules of natural drainage to Illinois highways. It pointed out that drainage of highways across adjoining lands is governed by the same rules applying to individual adjoining lands except where the highway authorities come under the eminent domain laws of the state.⁽²¹⁸⁾ The reason is that the right to drain other than in the course of nature is an easement which, at common law, can be obtained only by deed or prescription. By statute, highway authorities may obtain this right through the use of eminent domain.⁽²¹⁹⁾

a. ACQUISITION OF PROPERTY

Highway Code sections 4-502, 5-802, and 6-802 each provide substantially as follows:

When the highway authority deems it necessary to build, widen, alter, relocate or straighten any ditch, drain, or watercourse in order to drain or protect any highway or highway structure it is authorized to construct, maintain or operate, it may acquire the necessary property, or such interest or right therein as may be required, by gift or purchase or, if the compensation or damages cannot be agreed upon, by the exercise of the right of eminent domain under the laws of this state.⁽²²⁰⁾

(1) Constitutionality and Procedure

In earlier highway acts,⁽²²¹⁾ there were no statements concerning the use of eminent domain laws. Instead, the statute outlined the steps to be taken to acquire property and, in doing so, used the term "damages." This statutory language was attacked as unconstitutional, the assertion being that providing only for damages meant that private land could be taken for public use in violation of the Constitution of 1870, Article II, section 13.⁽²²²⁾ This

objection to the statute was answered by the court's broad interpretation of the term "damages." The award of damages was to include both value of the land taken and injury caused to the land retained.⁽²²³⁾ Similar constitutional questions should not arise today, since the statute now incorporates the eminent domain laws of the state rather than specifically stating the steps to be followed.

Procedurally, the statute seems to require that highway authorities attempt to acquire the desired property by gift or purchase before instituting eminent domain proceedings. Note the wording under the previously mentioned sections of the statute pertaining to the acquisition of property: ". . . by gift or purchase or, if the compensation or damages cannot be agreed upon, by the exercise of the right of eminent domain."⁽²²⁴⁾ An earlier statute read: "[U]nless the owner of such land, or his agent, shall first consent to the cutting of such ditch, the commissioners shall apply to any justice of the peace. . . ."⁽²²⁵⁾ This clause was interpreted to mean that the statutory method of acquiring the land must be preceded by an offer of just compensation to the owner and his refusal to accept that offer.⁽²²⁶⁾ The present wording may be similarly interpreted.

(2) Determination of Necessity

The statute provides that eminent domain proceedings may be exercised when the highway authority "deems it necessary." Whether such necessity exists is a question to be determined by the highway authorities, acting in their official capacity, and is beyond the control and jurisdiction of the courts unless there is fraud or a clear purpose of oppression.⁽²²⁷⁾ The exercise of discretion will be interfered with only when a private right of a citizen is invaded.⁽²²⁸⁾

(3) Direction of Flow

The statutory provision is in no way limited by the natural flow of water. The court has expressly stated that the purpose of the provision is to enable highway authorities to convey water from the highway in a direction in which it would not run in the course of nature.⁽²²⁹⁾

(4) Limitation: Sewage

The right of eminent domain may not be used for the purpose of carrying off sewage deposited on the highway by the drains of an incorporated village. The statute does not contemplate such usage.⁽²³⁰⁾

(5) Limitation: Subsequent Negligence

When land is acquired by eminent domain for highway purposes, certain injuries to the landowner are expected and included in the eminent domain award. However, condemnation by eminent domain is no bar to a suit by the landowner for subsequent injury growing out of the negligence and unskillfulness of the public authorities in constructing drains in the highway.⁽²³¹⁾

b. ENTRY ON LANDS TO MAKE SURVEYS

In order to make surveys and to determine the amount and extent of land necessary to be taken for a highway project, the highway authority may enter the lands or waters of another after giving notice to that landowner. The highway authority is responsible for all damages occasioned thereby.⁽²³²⁾

2. Contract with Owners or Occupants of Adjoining Lands

a. CONTRACTS UNDER STATUTORY PROVISION

Highway Code section 9-107 provides:

Whenever the highway authorities are about to lay a tile along any public highway the highway authorities may contract with the owners or occupants of adjoining lands to lay larger tile than would be necessary to drain the highway, and permit connection therewith by such contracting parties to drain their lands.⁽²³³⁾

No cases have been discovered dealing with this precise situation, although two cases mention this provision. In one case the court pointed out that under the facts of the case the highway authorities were not taking steps to tile-drain the highway and therefore the provision did not apply to the question involved.⁽²³⁴⁾ In the other case the adjoining owner had constructed a tile drain in the highway. The court found that the drain benefited the highway, implying that it was part of the highway drainage system and not merely a private drain. As a partial justification for allowing the drain to remain in the highway, the court cited the above statute and held that highway authorities "have the right to lay tile in the road and to make contracts with adjoining owners for that purpose."⁽²³⁵⁾ Thus a loose interpretation of the statute aided the court in arriving at a desirable decision.

b. CONTRACTS OUTSIDE STATUTORY PROVISION

(1) Highway to Drain onto Landowner's Property

It appears to be permissible for the highway authority to contract with an adjoining landowner

for the right to drain onto the adjoining land. If the contract contemplates lawful disposition of the water by the landowner, the highway authority is not responsible for subsequent unlawful disposition.⁽²³⁶⁾

(2) Landowner to Construct Ditch into Highway

The type of drain involved in the statutory section quoted previously (section 9-107) is one that is part of the highway drainage system and is therefore a part of the highway.⁽²³⁷⁾ As such, it is a benefit to the highway. A different situation is encountered where a landowner is given permission to construct a drain in the highway solely for his own purposes.

Two similar cases have dealt with this situation. In each case the highway authority had given the landowner permission to construct a ditch in the highway right-of-way solely to drain his own property. Both ditches were constructed in the highway right-of-way at locations where the highway fronted a second landowner's property. In other words, the ditch began on the land of the party who had received permission from the highway authority and ran, in the highway property, along the land of another. In each case the question was whether these ditches must be allowed to remain in the highway right-of-way.

In denying the right of the landowner to maintain the ditch, the court in the first case held that highway authorities cannot bind the public to furnish drainage for a private individual's lands. A mere license or permission given to a private individual to dig a ditch along the highway, even though he acts and expends money upon such permission, cannot operate as a grant of a perpetual right for such individual to drain his land through this ditch. The authorities cannot grant away the use of the right-of-way of the public highway to a private person.⁽²³⁸⁾

The second case reached a similar conclusion. This holding, however, was based on the rule that highway authorities own only an easement in the land of the highway and the fee remains in the adjoining owner.⁽²³⁹⁾ Highway authorities have no right to grant abutting landowners the privilege of digging a ditch in the highway fronting the property of another landowner, since it would be imposing an additional burden and servitude on such land inconsistent with the limited rights of the public in the highway.⁽²⁴⁰⁾

3. Injuring or Obstructing Highways

a. STATUTORY PROVISION

Highway Code section 9-117 reads as follows:

If any person injures or obstructs a public highway by . . . plowing or digging any ditch . . . or by turning a current of water so as to saturate, wash, or damage . . . or by plowing in or across or on the slopes or the side gutters or ditches, or by placing any material in such ditches . . . without the permission of the highway authority . . . he shall be fined for every such offense . . . and . . . for every day he allows such obstruction to remain after he has been ordered to remove it by the highway authority having jurisdiction over such highway. . . .

The highway authority . . . after having given 10 days' notice . . . may . . . fill up any ditch . . . except ditches necessary to the drainage of an adjoining farm emptying into a ditch upon the highway. . . .

However, this section shall not apply to any person . . . through or along whose land a public highway may pass, who shall desire to drain his land, and who shall give due notice to the proper highway authority of such intention, and who shall first secure from such highway authority written permission for any work, ditching or excavating he proposes to do within the limits of the highway.⁽²⁴¹⁾

b. TURNING A CURRENT OF WATER

"Turning a current of water so as to saturate, wash, or damage" is included as an offense under section 9-117 of the Highway Code. The inclusiveness of the phrase is indicated by this statement of the court:

Water may be accustomed to flow in a limited stream or over a wide surface, and may flow continuously or at intervals, but wherever it flows, it is a current. . . . The evil which this statute was aimed at might be produced as effectively by turning the diffused drainage of a wide surface to one place, as by diverting the contents of a narrow stream. We are clearly of opinion that such drainage is within the purview of the law, and that, as applied to the general subject, the language employed fairly covers and includes it.⁽²⁴²⁾

It would appear that this provision includes the various types of unlawful diversions of water from a natural watercourse discussed under the section of this report dealing with natural drainage.

c. NOTICE

The initial fine provided for in the statute is imposed for the obstruction itself. If the obstruction is allowed to continue, an additional fine may be recovered. It is clear that no notice is required to recover the initial penalty, whereas notice must be given before the subsequent fine may be imposed.⁽²⁴³⁾

d. NECESSITY FOR DITCH

Excluded from the category of obstructions are ditches necessary for the drainage of an adjoining farm emptying into a ditch upon the highway. The court has held that a ditch which allows water from adjoining lands to flow naturally into a highway ditch is "necessary." Conversely, a ditch that diverts water from its natural course in order to reach the highway is not necessary and is not protected by the statute.⁽²⁴⁴⁾

e. A DITCH AS AN OBSTRUCTION

The circumstances under which a ditch constructed in the highway by an adjoining landowner without permission constitutes an obstruction are not clear. The confusion centers around the fact that the highway authorities are not considered absolute owners of the land within the highway. The public has but an easement in the highway, and the fee remains in the adjoining owner, who may exercise every right of ownership not inconsistent with the easement of the public.⁽²⁴⁵⁾

This is the general rule in Illinois. However, under the wording of the Illinois Highway Code and under the eminent domain laws of the state, it is possible for the highway authority to obtain the entire fee interest in any land taken rather than merely an easement. Note the language of two Code sections: "The Department, in its name, or any county may acquire the fee simple title, or such lesser interest as may be desired, to any land, rights or other property necessary for the construction, maintenance or operation of state highway . . .";⁽²⁴⁶⁾ ". . . it may acquire the necessary property, or such interest or right therein as may be required. . . ."⁽²⁴⁷⁾ If the entire fee is taken from the adjoining owner, the problems surrounding his rights when only an easement is taken will not exist.

An uncertainty exists concerning the rights of an adjoining owner to construct a ditch in the highway without permission when the fee is not taken. An early appellate decision held that "the digging of the ditch inside the limits of the highway is of itself an injury. It is a trespass unless the digging is by permission or under some legal right."⁽²⁴⁸⁾ The landowner involved had not secured permission, and a fine was therefore imposed. The fact that he was the fee owner was not discussed. The appellate court apparently did not feel that this was sufficient justification for his act; his ownership of the fee was not looked upon as "some legal right."

On the other hand, the adjoining owner's title to the fee has been interpreted as giving him the right to use the land of the highway in any manner he wishes, including the construction of a ditch, so long as the easement of the highway is not affected. The digging of the ditch in itself is not an obstruction. The ditch becomes an obstruction only if it renders the highway less safe, useful, or convenient for the public. This is a question of fact to be determined by a jury. The court stated its holding as follows:

The appellant [owner of the fee] had a right, upon this highway, to do that necessary for the drainage of his lands, provided he did not interfere with the use of the highway, rendering it less safe, useful or convenient for the public. If the ditch dug by appellant was an obstruction on this highway then his acts were unlawful. The finding of the jury was that the ditch was an obstruction, and that finding we are not authorized to disturb.⁽²⁴⁹⁾

4. Maintenance and Repair

The Highway Code imposes upon the respective highway authorities the duty to construct, maintain, and repair the highways within the jurisdiction of each authority.⁽²⁵⁰⁾ An additional section provides the procedural steps for compelling highway commissioners to make road repairs.⁽²⁵¹⁾

The question is whether these sections impose upon the highway authority the duty to maintain and repair drainage systems along the highway, both when adjoining owners have connected under section 9-107 of the Highway Code⁽²⁵²⁾ and when they have constructed private drains with permission upon land obtained under eminent domain provisions. The sections imposing the duty of maintenance and repair do not expressly include drainage systems, but such systems appear to be included in the definition of "highways" in the Highway Code.⁽²⁵³⁾ However, it is not likely that drains constructed for private purposes in the highway right-of-way are included within the statutory definition of "highway," and therefore it would seem that the responsibility of the highway authority for maintenance and repair would not extend to such drains.

An early appellate case dealt indirectly with the maintenance and repair question. The court, in discussing the right of the highway authorities to fill a certain highway ditch, said:

It was therefore clearly their duty, under the statute which gave them charge of the road and required them to keep it in repair, . . . to fill it [the ditch] up, as the needful and only way to avert the danger and put an end to the wrong and injury.⁽²⁵⁴⁾

5. Recording of Plats

Whenever a highway is laid out, widened, or altered in accordance with the Highway Code, the proper highway authority shall cause a plat to be made and recorded in the office of the recorder of deeds of the county or in the office of the registrar of titles for the county if appropriate.⁽²⁵⁵⁾

6. Willow Hedges as a Public Nuisance

Where willow hedges, or a line of willow trees have been planted along the margin of a highway, so as to render tiling impracticable, the highway authority having jurisdiction of such highway may contract with the owner for their destruction; and they shall be destroyed before tiling. The planting of such hedges or trees hereafter on the margin of highways is declared to be a public nuisance.⁽²⁵⁶⁾

7. Lateral Support and Deposit of Spoil

It is unlawful for any person to excavate or remove . . . the lateral support within a distance of 10 feet plus one and one-half times the depth of any excavation adjacent to the established right-of-way of any public highway located outside the corporate limits of any municipality, except that if any of the excavated materials be of solid rock, the depth of such solid rock shall not be considered in computing the limit of excavation from such right-of-way line of such public highway.

It is unlawful for any person to deposit spoil . . . in such a manner that the toe of such spoil will be nearer than 20 feet to any established right-of-way of any public highway located outside the corporate limits of any municipality.

Whenever any person violates . . . the foregoing provisions . . . he shall be fined. . . .

Where any such violation occurs along any public highway the proper highway authority . . . is authorized to take the necessary steps as required by law to enter upon the property where such violation occurs and back-fill . . . the unlawful excavation or remove . . . the unlawful spoil banks. . . .⁽²⁵⁷⁾

B. DRAINAGE DISTRICTS

1. General

The organization and operation of drainage districts in Illinois are governed by the Drainage Code. This code completely revised the two existing drainage laws, which dated back to 1879 and 1885. Although most of the reported cases deal with the two earlier laws, the provisions of immediate interest to this report were substantially retained in the new code and the implications of the various sections therefore remain unchanged.

It is not the purpose of this report to study the technical aspects of the drainage district organization and operation, but instead to discuss the rela-

tionships and the relative rights and duties that exist between the drainage districts and the respective highway authorities. For this reason all technicalities have been omitted, and only Drainage Code provisions of either definite or possible application to highways are included.⁽²⁵⁸⁾ As a starting point, however, summarized statements are presented to indicate, in a general manner, the basic principles governing drainage districts:

(1) They are authorized by the General Assembly but are not specifically created by it. Thus, the legislature creates the framework for a drainage district and gives it certain powers, but leaves it up to the people of the area to determine the need for such a district.

(2) They do not follow existing governmental lines (county, township or city) but can be created on the basis of physical need, i.e., a natural drainage basin or a unified river network.

(3) Their powers relate solely to the specific purpose at hand. . . .

(4) The procedure for organizing and governing the districts is usually the same, starting with a petition of a certain number of residents of the area to the county judge, a general election, appointment of commissioners or trustees, etc.⁽²⁵⁹⁾

(5) Drainage districts are dependent solely upon statute, and these statutes must be fulfilled to make their organization legal.⁽²⁶⁰⁾

2. Assessment of Highway as Drainage District Member

a. ASSESSMENT OF HIGHWAYS

The Illinois Constitution provides that the property of the state, counties, and other municipal corporations may be exempted from taxation, but that such exemption shall be only by general law.⁽²⁶¹⁾ This constitutional provision is not self-executing, and affirmative action by the General Assembly is required in order to exempt property from taxation.⁽²⁶²⁾ All property will be subject to taxation unless it falls within the provision of a statute exempting it from such taxation. Affirmative action by the General Assembly to exempt the state government from taxation has taken place under the express provisions of the Revenue Act. This act states that all property of every kind belonging to the State of Illinois is exempt from taxation.⁽²⁶³⁾

The Illinois Constitution further provides that the State of Illinois shall never be made defendant in any court of law or equity.⁽²⁶⁴⁾ This provision means that the collection of assessments or taxes against state property is not enforceable by law. The courts have relied upon the above-named

provisions in holding that state property is not subject to special assessment or taxation by cities and villages for making local improvements.⁽²⁶⁵⁾

The Drainage Code contains a section which specifically provides that highways may be included in the assessments of a drainage district. Drainage Code section 5-2 reads:

Upon the organization of the district, the commissioners shall proceed to make out their assessment roll of benefits, damages and compensation, and they shall include therein all lands, lots, railroads, public highways, streets and alleys and other property within the district which, in their opinion, will be benefited, taken or damaged by the proposed work. . . .⁽²⁶⁶⁾

Court cases furnish examples of the application of this provision.⁽²⁶⁷⁾ In a case where a town contended that it could not be assessed for its highways, the court answered:

If the highways of a town are benefited by the improvement they fall within the class of property that may be assessed therefor, such assessments, however, being enforceable against the town and not against the specific property benefited.⁽²⁶⁸⁾

These citations and comments appear to be confined to the lesser political subdivisions, such as counties and townships. It has been stated by the court that cities, villages, and counties are mere agencies of the state through which local government is conveniently administered, and that the general assembly may authorize property held by one of its agencies to be burdened with a charge for the benefit of another of its agencies to the extent of benefits received.⁽²⁶⁹⁾

It therefore appears that the state is exempt from any form of taxation or assessment. However, it does appear that the lesser political subdivisions are subject to taxation and assessment and section 5-2 of the Drainage Code therefore applies to them.

b. NEED TO SHOW BENEFIT

A limitation placed upon the right of a drainage district to assess lands is that benefit to those lands must be shown and the assessment must not exceed the benefit. These requirements are stated in Drainage Code sections 3-23 and 5-1. Section 3-23 reads:

If, at the conclusion of the hearing, the court approves the plans for the proposed work or any modification thereof and finds that the benefits to the land in the proposed district from such work will exceed the cost to that land, then the court shall order the organization of the district. . . .⁽²⁷⁰⁾

Section 5-1 reads:

No land or other property shall be assessed for bene-

fits more than its just proportion of the entire assessment or in excess of the benefits thereto.⁽²⁷¹⁾

Court decisions have applied this principle to highway assessment situations as readily as to any other. The limitation has been stated as follows, the first statement made in a highway case:

The only limitation upon the property that may be assessed is that it must be property benefited by the improvement.⁽²⁷²⁾

In order to be assessed for a drainage project, lands must be thereby rendered more productive, more accessible, or their market value substantially increased and their actual or intrinsic value enhanced.⁽²⁷³⁾

The question litigated is what constitutes benefit. The rule in Illinois is that if a party has adequate drainage under natural drainage rules, he is not benefited by the drainage district and his lands cannot be assessed by the district.

Because land owners are joined together in a drainage district affords no reason why all land owners must contribute to every improvement which may assist in the drainage of the district. The relative location of the lands and the benefits to accrue therefrom must be considered. It is not enough that the lands are in the same watershed.⁽²⁷⁴⁾

The owner of the dominant estate may rightfully collect the surface waters upon his land and by means of ditches conduct them into natural water-courses which empty into the ditches of the district, without subjecting his land to be annexed to the district.⁽²⁷⁵⁾

3. Use of Highways by Drainage District

Drainage Code section 4-14 reads in part:

The commissioners are empowered to . . . use any part of any public highway for the purpose of work to be done, provided such use will not permanently destroy or materially impair such public highway for public use. . . .⁽²⁷⁶⁾

The extent to which the highway may be used is not clear from the statute. From the reported cases it appears that the statute permits cutting across a highway with a drainage district ditch. A full discussion of the implications of such cutting will be found in the section covering bridges and culverts.

The question is whether the right to use a public highway gives to a drainage district (1) the right to drain into highway ditches and (2) the right to construct a drain along the highway in the right-of-way. There are no cases interpreting the statutory language that answers this question. As to the construction of a ditch within the highway right-of-way, the problem discussed in the cases is not whether the drainage district is within its rights in

regard to the highway authority, but instead whether the district has obtained the consent of the fee owner.

While it is necessary to secure the consent of the commissioners of highways to lay within the highway a drain for drainage which is not primarily or exclusively for the benefit of the highway but which is for the use of the adjoining lands, the commissioners of highways do not possess the sole power and authority to grant a right-of-way for such improvement. Section 13 of article 2 of the Constitution provides that private property shall not be taken or damaged for public use without just compensation. . . . The laying of this tile in the public highway was an additional burden and servitude upon the fee.⁽²⁷⁷⁾

4. Eminent Domain

The Drainage Code states that:

Whenever the commissioners are unable to agree with any landowner . . . on the amount of compensation to be paid . . . then the commissioners may . . . acquire any such lands, easements, rights-of-way, properties and interests, whether privately owned, publicly owned or held for the use of the public, by the exercise of the right of eminent domain.⁽²⁷⁸⁾

No cases have been found involving the use of this right against a highway authority. The statutory language, however, uses the phrase "held for the use of the public," which is the characteristic language of the courts in defining the manner in which public highways are held by highway authorities.⁽²⁷⁹⁾ Therefore, the question is whether a drainage district may use the right of eminent domain against a highway authority, whether or not the fee is held by the highway authority.

5. Annexation of Lands to Drainage Districts

Lands lying outside a drainage district may be annexed to the district in any one of three ways: (1) connection to the drains of a drainage district, (2) petition by commissioners, and (3) petition by landowners. The third method of annexation is not often litigated because it involves the express desire of the owners of land outside the drainage district. The first and second methods, however, have been the subject of controversy.

Although no cases on annexation have involved a highway authority as a party, there appears to be no reason why it could not be found in such a position. The importance of the annexation provisions is that once annexation is found to exist, such land may be assessed.

Regarding the first method, Drainage Code section 8-2 reads:

Any owner of land which lies outside of a district, subdistrict or minor subdistrict but within the same natural drainage area, or involved in the same system of drainage as the lands within the district . . . may connect his land to any open ditch of the district . . . or, with the prior consent of the commissioners, to any covered drain of the district. . . . Any connection so made shall be subject to the conditions of Section 12-1. When any such connection is made, the landowner involved shall be deemed to have consented to the annexation of such land to the district. . . .⁽²⁸⁰⁾

Regarding the second method, Drainage Code section 8-3 reads:

When any land lying outside of a district has been connected to a district drain or has been or will be benefited or protected by any district work done or ordered to be done, the commissioners may petition the court to annex such land to the district. . . .⁽²⁸¹⁾

By way of summary, section 8-2 states that connection to a drainage district ditch by an outsider is deemed to be consent for annexation. Section 8-3 states that when connection or benefit can be shown by the drainage district, the drainage commissioners may petition the court for annexation.

When either connection or benefit is shown, the courts do not hesitate to annex the lands to the drainage district:

[I]t has been held that while the owner of the dominant heritage has the right to collect the waters naturally flowing from his lands over the servient heritage into ditches and drains and thus to discharge them, yet when he connects his ditches with the ditches dug by the district the statute takes effect, and he must be held to have voluntarily applied to have his lands included within the district. The mere fact that these relators had the legal right to have the waters from their lands flow off over the lands below them lying within the drainage district gave them no right to connect their drains with the artificial drains of the district without subjecting themselves to the conditions imposed by the statute.⁽²⁸²⁾

On the other hand, where the drainage district has not benefited the land and where no connection has been made, the courts just as readily refuse to annex the lands:

The evidence shows that the lands included in the drainage district as originally formed, so far as drainage is concerned, are, and always have been, servient to the lands of the relators, and that the relators have done nothing further than to collect the surface waters upon their respective tracts of land and by means of tile drains and open ditches conduct them, in the natural course of drainage, into natural water-courses which either directly or indirectly have as their outlet the ditches of the district. . . .

In order to establish that a tract of land lying outside a drainage district has been connected by the owner

with the ditches of the district it is not sufficient to merely show that the waters from that tract ultimately pass into and through the district ditches, but it must further appear that an artificial ditch has been constructed leading from that land directly into the district ditch or into some ditch which has been theretofore artificially connected with the drainage ditch. Such is, in effect, the substance of our previous decisions upon this question. The proof fails to show that any of the relators' lands have been so connected, and the authority of the drainage commissioners to annex the lands in controversy to the district was therefore not established.⁽²⁸³⁾

6. Miscellaneous Provisions

a. RIGHTS OF LANDOWNERS WITHIN A DISTRICT

Two sections of the Drainage Code deal with the rights of landowners within the district, i.e., district members. Section 12-1 grants the right to use district drains:

A landowner within any drainage district has the right to use the ditches and drains of the district as outlets for any drains, either open or covered, which he may desire to construct for the more complete drainage of his own land. . . .⁽²⁸⁴⁾

Section 12-2⁽²⁸⁵⁾ is the result of a 1943 case which held that landowners within a drainage district relinquished some of their common-law rights. The court in that case said:

All of the landowners who were included in the district, and who accepted these benefits, relinquished to that extent any common-law right of dominant flowage over that of the land lying below them by connecting with the ditches of the district. While it is true the principle might have application as to water normally flowing over the surface of a higher tract to a lower tract, and not attached to the drains of the district, yet when the upper and lower landowners unite in forming a district for obtaining the benefits to be derived from the removal of water by means of drains or levees the principle has no application, for the simple reason the parties have agreed to adopt the drainage system provided by statute in lieu of the rights at common law. . . .⁽²⁸⁶⁾

To change this result, section 12-2 provides:

Land included within a district shall continue to have the same rights of drainage, both common law and statutory, as land not within an organized drainage district, except insofar as the drainage system of the district may vary from or be inconsistent with natural drainage. The construction of a covered drain by a drainage district in the course of natural drainage or along the course of an open ditch shall not in itself be considered to be an abandonment of the natural drain or the open ditch.⁽²⁸⁷⁾

b. LANDOWNERS' USE OF THE RIGHT-OF-WAY

Drainage Code section 12-3 reads:

The owner of any land over, through or across which a district has acquired a right-of-way . . . may use the

land occupied by such right-of-way in any manner not inconsistent with the paramount easement of the district. Any use of the right-of-way which will interfere with the operation of the drain or will increase the cost to the district of performing any of its work thereon is deemed to be inconsistent with the district's easement. . . .⁽²⁸⁸⁾

c. PENALTIES

Additional Drainage Code sections provide penalties: (1) for injuring a drain, drainage structure, levee, or pumping plant (section 12-7),⁽²⁸⁹⁾ (2) for preventing entry by commissioners upon lands or rights-of-way (section 12-8),⁽²⁹⁰⁾ and (3) for preventing construction or repair of private drains (section 12-9).⁽²⁹¹⁾

C. INDIVIDUAL LANDOWNER

The subjects discussed under this heading are substantially the same as those covered under "Highway Authority." The present section views the subjects from the standpoint of the individual landowner, whereas the prior section viewed them from the standpoint of the highway authority. The previous section contains a full discussion of the statutory provisions.

1. Contract with Highway Authority

An adjoining landowner may contract with the highway authority whereby the authority will lay a larger drain tile than is necessary to drain the highway and the landowner will be allowed to connect therewith.⁽²⁹²⁾ The landowner will be required to pay such sum as the enlargement of the tile drain will cost in order to carry off the additional water that might come from his land.⁽²⁹³⁾ Contracts between the highway authority and adjoining landowner, other than those contemplated by this statutory provision, were discussed earlier and are not included here.

2. Drain into Highway with Permission

A landowner through or along whose land a public highway passes and who desires to drain into the highway may so drain if he first gives due notice to the proper highway authority and receives from that authority written permission for any work, ditching, or excavating he proposes to do within the limits of the highway.⁽²⁹⁴⁾

3. Injuring or Obstructing Highway

Highway Code section 9-117⁽²⁹⁵⁾ provides that a penalty be imposed on any person who injures or

obstructs a highway. However, the consequences of an adjoining landowner constructing a ditch in the highway without permission are not clear. The act of construction alone may be considered an obstruction and subject the landowner to a penalty under the Highway Code.⁽²⁹⁶⁾ Or the ditch may be considered an obstruction only if it renders the highway less safe, useful, and convenient to the public.⁽²⁹⁷⁾

Nevertheless section 9-117 of the code also permits an adjoining landowner to commit certain acts without subjecting himself to the penalty for obstruction. The landowner may:

(1) Drain into a ditch located across or along the highway following the course of natural drainage.⁽²⁹⁸⁾

(2) Drain into a highway passing through or along his land if permission has been secured.⁽²⁹⁹⁾

4. Cutting or Damaging State Highways

No person shall willfully cut, excavate or otherwise damage that portion of any highway under the jurisdiction and control of the Department, including the hard-surfaced slab, shoulders and drainage ditches, either within or without the corporate limits of a municipality without a permit to do so from the Department. The Department shall issue its permit when such cutting, excavating or damaging is reasonably necessary, but it is the duty of the person securing a permit to make such repairs to the highway as will restore it to substantially the same condition as it was originally. . . . To insure the proper repair, the Department may, before issuing its permit, require the person applying for a permit, to enter into a bond payable to the People of the State of Illinois in a sum commensurate, in the opinion of the Department, with the injury to be done to the highway, conditioned for its proper restoration within such time as the Department may prescribe. . . .⁽³⁰⁰⁾

5. Lateral Support and Deposit of Spoil

A landowner may not remove the lateral support within certain specified distances of the highway. Neither may he place the spoil of any excavation within a specified distance of the right-of-way of the highway.⁽³⁰¹⁾

D. EXTENSION OF COVERED DRAIN THROUGH LAND OF OTHERS

1. Statutory Provisions

a. EXTENSION OF COVERED DRAINS THROUGH LAND OF OTHERS

When it is necessary for the owner of land which may be drained by a covered drain to extend such drain through the land of others in the general course of

natural drainage in order to obtain a proper outlet and the owner of, or other party interested in, the land through which such extension is necessary refuses to consent to the extension . . . , the person desiring to construct the drain may file suit in the county court in the county in which such land lies against the owner . . . and summons shall issue . . . and proceedings shall be had thereon as in other civil actions in county courts.⁽³⁰²⁾

b. BOND

At the time of commencing the action, the plaintiff shall file a bond in the penal sum of not less than \$100 . . . conditioned upon the payment of all costs accruing in the action and . . . all damages which may be awarded to the defendant.⁽³⁰³⁾

c. PLAT AND PROFILE

At the time of commencing the action, the plaintiff shall also file a map or plat showing the land proposed to be drained, the land across which the drain is proposed to be constructed and the starting point, route and outlet of the proposed drain and a profile showing the elevation of the flow line of the proposed drain and the elevation of the surface of the ground through which the drain is proposed to be constructed.⁽³⁰⁴⁾

d. TRIAL, FINDING OF VERDICT, AND JUDGMENT

If, on the trial of the case, it is found that the proposed drain will be of ample capacity, will not materially damage the land of the defendant and will empty into (a) a natural watercourse, (b) an artificial drain along a public highway, with the consent of the highway authorities, or (c) any other outlet which the plaintiff has the right to use, then the finding or verdict shall be for the plaintiff; and the defendants shall be allowed such actual damages only as will be sustained by entering upon the land and constructing the drain and thereafter keeping the same in repair. If it is not so found, then the finding or verdict of the jury shall be for the defendant. . . .⁽³⁰⁵⁾

e. CONSTRUCTION AND MAINTENANCE

The plaintiff, after paying . . . the damages . . . , may thereupon enter the premises of the defendant and construct the drain, and he or his successors in title may thereafter at all times enter upon such land for the purpose of repairing and maintaining the drain. . . . The plaintiff . . . shall keep it in good repair. If, in repairing the drain, the plaintiff . . . cause[s] any damage . . . he . . . shall be liable for the actual damage caused. If, in constructing or repairing the drain, the plaintiff . . . shall wilfully cause any unnecessary damage . . . he shall become liable for . . . 3 times the amount of the unnecessary damage done. . . .⁽³⁰⁶⁾

f. ABANDONMENT OF PROCEEDINGS

If, after obtaining such a judgment, the plaintiff elects . . . to abandon the proceedings, the court shall note such voluntary abandonment upon the docket. If the plaintiff fails to construct the drain within 2 years after obtaining such a judgment, the court, on motion of the defendant . . . shall note the failure to construct and resulting abandonment. . . . If the plaintiff abandons the proceedings, either voluntarily or by failure to con-

struct the drain as set forth above, he shall not be permitted to commence another action against the defendant for the same purpose until after the expiration of 5 years from the rendition of the judgment. . . .⁽³⁰⁷⁾

2. Constitutionality

The leading case litigating the extension-of-covered-drain provision has resolved some uncertainties resulting from the general language of the statute, but has left other questions in doubt.

The constitutionality of the statute was challenged on the ground that it permitted the taking of the private property of one landowner for the private use of another. The court summarily answered the challenge:

It is sufficient to say, that said statute is clearly within the legislative power conferred upon the General Assembly by section 31 of article 5 of our present State Constitution. That section provides that: "The General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural sanitary and mining purposes, across the lands of others."⁽³⁰⁸⁾

A second constitutional question was raised because of the statute's use of the term "damages" instead of the customary "just compensation" when a taking of land is involved. In the words of the statute, the defendant is to be allowed "such actual damages only as will be sustained by entering upon the land and constructing the drain and thereafter keeping the same in repair." If strictly construed, this award of damages would not be "just compensation" as the term is usually interpreted in the taking of private property. Therefore, to avoid declaring the statute unconstitutional, the court held:

This language clearly embraces all damages which will be sustained by . . . the entry upon the land and the construction of the ditch, and the word "only" cannot be held to have the effect of restricting it to anything less than all the damages thus occasioned. The entry upon the land and the construction of the ditch . . . constitute, in law, a taking and appropriation of a perpetual easement in the defendant's land, and all damages' both direct and consequential which necessarily result from such taking and appropriation, are actual damages occasioned by the construction of the drain. . . . We think, therefore, that substantially the same rules for the ascertainment of damages which prevail in proceedings for the condemnation of private property for public use should be adopted in cases arising under this statute.⁽³⁰⁹⁾

3. Bond and Plat

The plaintiff is required to file both a penal bond⁽³¹⁰⁾ and a plat⁽³¹¹⁾ of the land to be drained

and the land across which the drain is to be constructed. In the leading case, the transcript of the case from the justice of the peace contained a recital that the bond had been properly submitted. This recital, in the absence of any evidence tending to impeach it, was held to be a satisfactory compliance with the statute. In addition, a crude and imperfect sketch of the land to be drained had been submitted to fulfill the plat requirement. The court held that this imperfect sketch was a sufficient attempt at compliance with the statute.⁽³¹²⁾

4. Appeal

Under an earlier statute,⁽³¹³⁾ a clause was included which stated that the "judgment shall be final and conclusive. . . ." Therefore, when the defendant took an appeal to the Supreme Court, the plaintiff contended that such appeal was contrary to the statute. The court decided that "final and conclusive" did not mean that judgment of the justice of peace (where this type of action originated at that time) should necessarily be final, but that the final judgment, which might be the judgment on appeal, should be conclusive. The intent of the clause, reasoned the court, was to restrain repeated attempts by one party to litigate his right to extend a drain through the land of another.

The right to appeal was further justified by the clause ". . . proceeding shall be had thereon as in other civil causes. . . ."⁽³¹⁴⁾ The court reasoned that this clause clearly allowed appeal from judgments of the justice of the peace in cases arising under this statute just as in any other civil case.

The present statute retains this latter clause and eliminates the former. The question appears settled.

5. Applicability

Among the unanswered questions is to whom the statute applies, both as plaintiff and as defendant. Clearly an individual may occupy the position of plaintiff. But is it not clear whether the statute is restricted to the use of individuals. The term "person" used in section 2-2,⁽³¹⁵⁾ if narrowly interpreted, may exclude such quasi-corporations as the highway authority.

Furthermore, would the highway authority be permitted to use this provision in view of the fact that the Highway Code makes available to such a body the right of eminent domain?

The statute probably contemplates that the position of defendant will be occupied by an individual landowner. Nevertheless, could the highway

authority ever be found in that position? It seems unlikely that a landowner would seek permission to construct a covered ditch beneath a highway, since one of the enumerated outlets for such a ditch is "an artificial drain along a public highway, with the consent of the highway authority."⁽³¹⁶⁾

The wording of the statute does not clearly state the circumstances under which it may be used. First, its provisions are limited to situations where "it is necessary" to extend the drain. What constitutes a necessity is not defined. Second, the drain must be "in the general course of natural drainage." Just what this clause may require is likewise left undefined.

E. DRAINS AND LEVEES FOR MUTUAL BENEFIT

1. Purpose

Sections 2-8 through 2-11⁽³¹⁷⁾ of the Illinois Drainage Code deal with the subject of drains and levees for the benefit of the members of a mutual drainage system.

The purpose of the act has been repeatedly stated by the courts:

The statute referred to does not restrict or abridge the rights of drainage as they existed at common law. Its sole purpose and effect is to enlarge those rights. . . .⁽³¹⁸⁾

That act was intended to enlarge the rights of drainage as between adjoining land holders and to protect drains continuous in their character and purpose for the mutual benefit of the lands affected whenever they had been constructed by license or consent, though without written authority.⁽³¹⁹⁾

These broad statements must be limited in at least one respect: When a mutual drainage system exists, a landowner may be restricted in the full use of his common-law rights. In a 1907 appellate case, a landowner who was a member of a mutual drainage system attempted to use the common-law right of the dominant owner to artificially collect the surface water on his own land and discharge it on the servient owner at the point of natural entry. In artificially collecting the water, the landowner cut across several tiles of the mutual system, preventing water from flowing normally through the tiles. In holding that this normally permissible improvement on one's own land was not permissible under these circumstances, the court said:

[H]e has no right in doing so to disturb in any way the flow of waters which would pass off his premises through an outlet provided by a mutual system of drainage.⁽³²⁰⁾

2. Parties

While the statute speaks in general terms of "owners of lands," court decisions have determined which landowners may become parties to a mutual drainage system. Clearly an individual landowner is included within the statute. Just as clearly, a drainage district is excluded:

[T]he act was not designed and did not have any operation upon a drainage district or the ditches or drains therein. . . . The act of 1889 relates only to private and individual rights in ditches or drains constructed by mutual license, consent or agreement, and has no reference to the ditches or drains of an organized drainage district.⁽³²¹⁾

The act has been applied to highway authorities on the assumption that they may become members of a mutual drainage system. Once a member, however, it is not clear whether the highway authority will be bound in the same manner as an individual. One case indicates that the highway is similarly bound:

[T]he highway commissioners of the town of Oakwood have consented to the laying of this drain in the highway, and . . . they are bound thereby. Appellee is, therefore, protected in his right to drain the land through this small drain as it is now re-located in the highway. . . . Neither the public, through the highway commissioners, nor any private individual can interfere with this right.⁽³²²⁾

Another case, however, seems to indicate that the highway authority, although a member of a mutual drainage system, may make subsequent changes within the system which an individual member would be prohibited from attempting. After finding that a mutual drainage system existed, the court commented:

Even if public necessity and the security of the highway might authorize the highway commissioners to make changes, yet that could not be done till the necessity arose.⁽³²³⁾

Another question arises concerning the applicability of the statute to the highway. The cases in which a highway has been found to be a member of a mutual drainage system have usually involved situations where the system carried water away from the highway.⁽³²⁴⁾ There is at least one case, however, where the reverse was true.⁽³²⁵⁾ The highway authority had granted permission to an adjoining landowner to connect with and discharge into the highway drain under the predecessor to Highway Code section 9-107.⁽³²⁶⁾ The court found that the element of mutual benefit existed and that a mutual drainage system had been established. The

question raised is this: Whenever Highway Code section 9-107 is used by the highway authority to grant permission to an adjoining landowner to connect with the highway drain and where such connection benefits the highway, does a mutual system exist?

A third point concerning membership of a highway authority in a mutual drainage system involves the fact that a record is usually required as evidence of any official act of the highway authority.⁽³²⁷⁾ The subject of mutual drains, however, is an exception to this requirement. Where a party contested the fact that there was no mention of a mutual drainage system in the record of the acts of the highway authority, the court held:

It is true, the commissioners act by virtue of their corporate authority, and their acts, in most instances, can be proved only by the record, but the act here under consideration was not required to be made a matter of record to render it valid.⁽³²⁸⁾

3. Statute of Frauds

The Statute of Frauds⁽³²⁹⁾ is intended to prevent fraud and perjury by requiring certain transactions to be in writing.⁽³³⁰⁾ Transactions involving interests in land are among those falling within the Statute. Therefore, excluding the natural easement that exists under the rule of natural drainage, the right to drain through the land of another is an easement that can be obtained only by deed, conveyance in writing, or prescription. Drains constructed under the mutual drainage statute, however, are an exception to the Statute of Frauds and are not required to be evidenced by an agreement in writing.⁽³³¹⁾

4. Revocation of License

The original mutual drain statute of 1889 contained a provision allowing agreements for mutual drains then in existence to be revoked within one year. The purpose of this provision was to allow landowners who had made agreements prior to enactment of the statute to escape its effect. Litigation arose concerning whether the revocation had been made, whether it had been made within the one-year period, etc.⁽³³²⁾ These questions, of course, no longer arise. Under the present statute, there must be an agreement of all parties before the mutual license may be revoked.⁽³³³⁾

5. Drains Included

Drainage Code section 2-8⁽³³⁴⁾ defines the circumstances under which a drainage system is con-

sidered to be for the mutual benefit of adjoining lands. The section as set out here has been separated and numbered for easier reading.

- (1) When a ditch, covered drain or levee is, or has been, constructed by mutual license, consent or agreement, either separately or jointly, by the owners of adjoining lands so as to make a continuous line across the lands of such owners, or
- (2) When the owner of adjoining land is permitted to connect a ditch, covered drain or levee with another already so constructed, or
- (3) When the owner of lower land connects a ditch or covered drain to a ditch or covered drain constructed by the owner or owners of upper lands, or
- (4) When the owner of land protected by a levee has contributed to the cost of the construction, enlargement or reconstruction of a levee upon other land, such ditch, covered drain or levee shall be deemed to be a drain or levee for the mutual benefit of all lands connected to, or protected by, it.

Three points are clear under the first method enumerated by the statute:

- (1) The drain must be constructed by *mutual* license, consent, or agreement.⁽³³⁵⁾
- (2) The drain may be constructed either separately or jointly. Each landowner need not take part in the actual construction.⁽³³⁶⁾
- (3) The construction must result in a continuous line across the lands of member landowners.⁽³³⁷⁾

The following statement by the court illustrates the second method, which permits one landowner to connect a drain with the drain of his neighbor, with the permission of the latter:

[W]e are inclined to hold that the construction of independent ditches by adjoining owners of lands, and then connecting them together so as to form a continuous system of drainage across the lands of the several owners . . . would bring the case within the statute.⁽³³⁸⁾

The third method is exemplified by the situation in which an upper landowner had constructed a tile in the course of natural drainage, emptying onto the lower owner at the point of natural entry. The lower owner connected a tile on his land at this point, and a mutual system was established.⁽³³⁹⁾

No cases were discovered dealing with the fourth method mentioned by the statute.

6. Parol License and Acquiescence

Drainage Code section 2-8 provides:

The mutual license, consent or agreement required in this section need not be in writing, but may be established by parole [sic] or inferred from the acquiescence of the parties.⁽³⁴⁰⁾

It is clear that no writing is necessary in order

to establish a mutual system of drainage. Both parol agreements and agreements inferred from acquiescence are equally effective. Below are statements made in this regard by the court:

[I]ts existence as a mutual ditch was recognized by the request of Mrs. King's husband, in 1910, to repair it, and the action of the commissioners in doing so. . . . If the act of 1889 is applicable to this case, — and we think it is, — it is clear appellants had no right to destroy or obstruct the ditch.⁽³⁴²⁾

[T]he license, consent, or agreement with the parties need not be in writing, but shall be as valid and binding in parol as in writing.⁽³⁴³⁾

[I]t appears that he was present while the work was going on, and we are constrained to hold that there was such acquiescence on his part as to bring him within the provisions of the act of 1889.⁽³⁴³⁾

If it be conceded that the evidence does not show an actual agreement between the appellant and the city to construct a system of drainage for their mutual benefit, the fact that the system has been in existence for nineteen years without objection and with mutual benefit is sufficient to establish a mutual drainage system by implied agreement.⁽³⁴⁴⁾

[E]ven if it did not show an actual agreement between the parties, the fact that the main system has been in existence for said period without objection and with mutual benefit is sufficient to establish a mutual drainage system by implied agreement, within the meaning of the Drainage Act of 1889.⁽³⁴⁵⁾

7. Original Tract Divided

Drainage Code section 2-8 further provides:

When a ditch, covered drain or levee is privately constructed through or on a tract of land and the ownership of such tract is thereafter divided, such ditch, covered drain or levee shall thereupon be deemed a drain or levee for the mutual benefit of all the portions of the original tract connected to, or protected by, such ditch, covered drain or levee.⁽³⁴⁶⁾

A 1900 appellate case dealt with this situation, although at the time a like provision was not included in the statute.⁽³⁴⁷⁾ A drainage system had been established by a landowner who had since died. His land had been divided between two parties, one of whom sought to obstruct the drainage system. The trial court found that a mutual drainage system under the 1889 act existed. The appellate court did not rule on the issue, finding another basis upon which to decide the case. That a mutual drainage system exists and cannot be disturbed now appears settled by the statute previously quoted.

8. Connection by Third Party

Drainage Code section 2-9 reads as follows:

It is unlawful for any person to connect a ditch, covered drain or levee with any drain or levee deemed to

be for the mutual benefit of the lands connected or protected without the consent of all parties interested in such drain or levee. When an unlawful connection is made, any interested person may recover damages and, if an unlawful connection is made to a covered drain, may compel disconnection.⁽³⁴⁸⁾

Basically the section answers two questions: First, when may a third party connect, and, second, what is the remedy for unlawful connection?

As to when a third party may connect, the courts strictly follow the statutory requirement that consent of all interested parties must first be obtained.⁽³⁴⁹⁾ Two qualifications, however, must be noted:

The first is illustrated by an 1897 appellate case that involved a mutual drain constructed in a natural watercourse. One party to the drain allowed connection by several third parties. When the second party contested, the court ruled that the connection was not unlawful, since the third parties were dominant owners whose surface water would flow through the natural watercourse in a state of nature, and since the mutual drain act did not restrict or abridge natural drainage rules.⁽³⁵⁰⁾

The second qualification is that the clause prohibiting connection has been interpreted as a protection for parties to a mutual drain who have made no contrary agreement. Therefore, where the parties agree among themselves that all or certain members may allow connection by third parties of their own choosing, such agreement will be upheld.⁽³⁵¹⁾

Just as establishment of the system in the first instance may be implied by acquiescence, the consent required for connection may likewise be implied:

We think that some of the surrounding facts and circumstances tend slightly to show that the appellant knew, at the time Ascherman's drain was built, that Drumond's drain [the third party] was to be connected with it. . . . We do not think the court erred in refusing to take the case from the jury on the ground that there was no proof of consent by appellant.⁽³⁵²⁾

Acquiescence, however, is not implied where the facts indicate quite the opposite:

There is no merit in the contention that defendants in error are to be held to an implied consent to the connection enjoined because of the fact that they waited a year, or almost a year, after the connection was made to bring their suit. They notified plaintiffs in error very shortly after the connection was made to disconnect and close up the tile drain and within less than a year thereafter began this suit.⁽³⁵³⁾

The evidence fails to show that appellee, by word or action, consented to or acquiesced in the action of appel-

lant. Upon the contrary, when he saw him laying the tile and making the connection, he told him he was doing an unlawful thing, and that if he ever suffered in consequence thereof he should hold him responsible.⁽³⁵⁴⁾

The second question is how to remedy unlawful connection. The statute specifically allows damages for all unlawful connections and injunctive relief for unlawful connection to a covered drain. Since compelled disconnection is expressly mentioned, the courts do not hesitate to use this mandatory remedy,⁽³⁵⁵⁾ regardless of the fact that it may cause more damage to the party allowing connection and to the third party than would be suffered by the party bringing the action if the relief were denied.⁽³⁵⁶⁾

9. Duration

Drainage Code section 2-10 reads:

Drains and levees deemed to be for the mutual benefit of the lands connected or protected shall constitute a perpetual easement on such lands and shall not be filled, obstructed, breached or impaired in any way without the consent of the owners of all such lands.⁽³⁵⁷⁾

An original mutual benefit act in 1889 did not state that the mutual system constitutes a perpetual easement, although it did prohibit filling, obstructing, breaching, or impairing the system. Even without the express statement that perpetual easement results from such a system, the courts reached this conclusion:

[A]s this statute is intended to enlarge those rights of drainage, it would seem that it was the intention of the legislature that in cases where the owners of such lands have constructed a ditch through their several tracts to carry off the water, the right to maintain the same and to have the water flow through it unobstructed should be a permanent one and pass with the land as an incident of ownership.⁽³⁵⁸⁾

Under the Drainage Act of 1889 drains constructed by mutual consent and agreement over adjoining lands and operating and remaining undisturbed for a period of time limited in the act are converted into perpetual easements.⁽³⁵⁹⁾

We are of the opinion that by force of the statute the license has been converted into a perpetual easement. The effect of the statute is to make such a ditch so constructed an encumbrance, so to speak, upon all the lands through which it passes. The right to it and its maintenance is an interest in the land itself, and passes with the land by conveyance, devise or descent, for the statute declares that it shall be held to be for the benefit of all the lands, and the obstruction to the flow of water is prohibited, and it is in effect made perpetual.⁽³⁶⁰⁾

Under these sections the owners of land who have established and constructed a system of drainage for their mutual benefit possess a right to have such system of drainage maintained as established.⁽³⁶¹⁾

Once established, the principle that mutual drains are perpetual in duration has seen repeated application.⁽³⁶²⁾ Even when a party incurs damages because of the system as it exists, he has no justification for interfering with the easement.⁽³⁶³⁾

10. Repair and Maintenance

Drainage Code section 2-11 provides:

The owner of any land connected to or protected by such a mutual drain or levee may, at his own expense, go upon the lands upon which the drain or levee is situated and repair the drain or levee, and he shall not be liable for damage to lands or crops unless he is negligent in performing the work.⁽³⁶⁴⁾

This section plainly grants to any member of a mutual system the right to go onto the land of another member to repair and maintain the mutual drain. This conclusion was reached by the court even before the statute so provided. Where a landowner was being charged with trespassing for having entered the land of another to clean a drain, the court said:

As a general proposition, whoever has an easement in or over another's land has the right to do all such things as are necessary to preserve the easement,—that is, he may keep it in repair, and has the right of access to make the necessary repairs. . . . It would seem, therefore, that the common law annexes to the easement of a drain in another's land the right to go upon such land and clean out or repair such drain without doing unnecessary injury to the land. Nor can we conclude that the statute has taken away this right.⁽³⁶⁵⁾

It must be noted, however, that section 2-11 of the Drainage Code grants a right but imposes no duty. Therefore, the question is whose is the burden of maintenance and repair. The courts have indicated that the most justifiable distribution of the burden of repair and maintenance is on the basis of benefit received:

It is not necessarily an equitable division of the burden of maintaining such a ditch once it has been constructed and keeping the same free from obstructions, to impose upon the several owners the obligation of maintaining and keeping in repair that portion of the ditch extending through their premises. If one be the owner of the servient estate, the ditch may be constructed partially for the benefit of his lands and partially for the benefit of the dominant estate, or it may be constructed solely for the benefit of the dominant estate. The distribution of the burden of maintaining the ditch must necessarily be governed by the facts in each particular case.⁽³⁶⁶⁾

[A]lthough the Act of 1889 imposes no duty of maintenance and repair upon the members of a mutual drainage ditch, the courts will apportion such duties in accordance with the benefits conferred by the drain, and

will enjoin any overt acts designed to change the water-course.⁽³⁰⁷⁾

The Drainage Code contains the following provision:

Where 2 or more parties owning adjoining or contiguous lands, or their predecessors in title, have, by voluntary action, constructed a combined system of drains, a combined system of levees or a combined system of drains and levees which form a continuous line or a continuous line and branches, the lands connected by

such system shall be liable for their just proportion of the cost of such repairs and improvements as may be needed therefore, the amount to be determined, as nearly as may be, on the same principles as if these lands were in an organized drainage district. Whenever such repairs and improvements cannot be made by voluntary agreement, any one or more parties owning land upon which any such work has been constructed may petition the court for the formation of a drainage district to include the lands connected by such system.⁽³⁰⁸⁾

V. BRIDGES AND CULVERTS

Since no decisions have been reported under the revised Drainage Code, the critique in this section will be based on interpretation by the courts of the mandates of prior statutes compared with the present-day code.

Prior to enactment of the code, there were differences of opinion concerning duties and responsibilities relating to building and maintaining bridges over natural and artificial watercourses. Therefore it should be advantageous to follow the judicial thinking leading up to our present drainage code.

A. CONSTRUCTION

1. Provisions Prior to Enactment of Drainage Code

A section in the Farm Drainage Act of 1885⁽³⁶⁹⁾ provided:

The [drainage] commissioners shall have the power and are required to make all necessary bridges and culverts along or across any public highway or railroad which may be deemed necessary for the use or protection of the work, and the cost of the same shall be paid out of the road and bridge tax, or by the railroad company as the case may be. . . .

The apparent meaning was that the highway authority would be required to pay for such construction. This language was held to be in contravention of the Illinois Constitution in a case decided by the Supreme Court of Illinois in 1907.⁽³⁷⁰⁾ The parallel of that section in the Levee Act of 1885⁽³⁷¹⁾ reads:

And, provided further, that the sum assessed against either of said corporations [town, railroad, etc.] shall not include the expense of constructing, erecting, or repairing any bridge, embankment or grade, culvert or other work of the roads of such corporations, crossing any ditch or drain, constructed on the line of any natural depression, channel or watercourse; but the corporate authorities of such road or railroad are hereby required, at their own expense, to construct such bridge, culvert, or other work, or to replace any bridge or culvert temporarily removed by the commissioners in doing the work of such district.

This act gave rise to even more litigation.⁽³⁷²⁾

Section 55 of the Levee Act was put in issue in the case of *Heffner v. Cass & Morgan Counties*.⁽³⁷³⁾ The court granted the demand of the plaintiff drain-

age commissioners that the highway authorities replace a bridge removed by the drainage commissioners in the course of enlarging a natural stream. The counties' defense, based on sections 9 and 10 of Article IX of the State Constitution, was that the legislature could not allow the drainage commissioners, at their discretion, to impose a debt on residents of the county not benefited by the drainage work. The court said:

These drainage commissioners did not, in removing the bridge, levy any tax on the county or upon its inhabitants. Nor did they thereby create any debt against the county, but merely removed a public bridge from a public highway by authority of a public law. . . .

In 1906, however, *Commissioners of Union Drainage Dist. v. Commissioners of Highways*,⁽³⁷⁴⁾ an appeal decided on issues of procedure not pertinent here, set the stage for a reversal of the *Heffner* case. The lower court had granted the plaintiff drainage commissioners a judgment for the cost of a bridge crossing an artificial ditch pursuant to the provisions of section 40½ of the Farm Drainage Act. The Supreme Court implied that such a result was unjust and perhaps contrary to the constitution and said:

[T]he ditch was for the sole and exclusive benefit of a drainage district constituting not more than three-eighths of the territory of the two towns, which is presumed by law to have been all the lands benefited by the ditch.

The next year, 1907, the decision in *Morgan v. Schusselle*⁽³⁷⁵⁾ was a direct holding that section 40½ was unconstitutional in that it enabled the authorities of one local government to impose a debt on the residents of another municipal corporation without the latter's consent. The court upheld the protest of the highway commissioners that they should not have to pay for a bridge torn down and rebuilt by the drainage commissioners and declared that the drainage district should absorb the full cost of all artificial ditches, including bridges crossing them.

Several other cases⁽³⁷⁶⁾ involving drainage districts organized under the Farm Drainage Act were

decided in the same manner as the *Schusselle* case. In *Commissioners of Highways v. Commissioners of Lake Fork Special Drainage Dist.*,⁽³⁷⁷⁾ the court extended the holding of the *Schusselle* case and compelled the drainage commissioners to rebuild a bridge over a ditch dug in the line of a natural watercourse.

In 1911, in *People ex rel. Parmenter v. Fenton & Thompson R.R.*,⁽³⁷⁸⁾ the *Heffner* case was modified to the extent that the commissioners of a district, under the Levee Act, were ordered to replace a bridge over a wholly artificial ditch. The court said:

It does not require any provision of the statute to compel the restoration of a highway, and it is not even within the power of the General Assembly to authorize the levy of a road and bridge tax on the taxpayers of the town for the benefit of a drainage district where the ditch is an *artificial one*. (Italics added.)

In *Duncan v. Fitch*,⁽³⁷⁹⁾ the same result followed in an appellate court. All that remained to be done by the courts regarding the liability of a drainage district organized under the Levee Act was to remove the distinction between the construction of bridges over drains in the line of a natural watercourse and those crossing artificial ditches.

The issue was finally settled in *People ex rel. Burow v. Block*.⁽³⁸⁰⁾ The drainage commissioners had cut through a highway while in the process of deepening and widening a drain that followed the course of a natural stream. The Supreme Court said:

These sections [nine and ten of Article IX of the State Constitution] prohibit the legislature from compelling a town to incur a debt without its consent and from granting the right of corporate taxation to any other than the corporate authorities who are the municipal officers directly elected by the people to be taxed or appointed in some mode to which the people to be taxed have given their assent.

Furthermore, the court invalidated the rationale of the *Heffner* case by saying:

While the destruction of the road is not the levying of a tax, the law which attempts to authorize it imposes an obligation on the town against its will, which the constitution prohibits. . . .

The request of the highway authority for a writ of mandamus was granted, and the drainage commissioners were required to replace the bridge. The court reaffirmed its ruling the next year in a short decision⁽³⁸¹⁾ based solely on the *Block* case. The *Block* case has been followed in every action⁽³⁸²⁾ raising the question upon whom the responsibility

rests for restoration of bridges destroyed or removed in the line of drainage work. As late as 1949, in a case involving the question of the duty of maintenance of bridges over canals constructed pursuant to the provisions of the Sanitary District Act,⁽³⁸³⁾ the Supreme Court, by way of dicta, said:⁽³⁸⁴⁾

It is thus apparent that, with respect to the duty of restoring a highway over a drainage ditch, it is immaterial whether the obstruction results from the improvement of a natural watercourse or the cutting of an artificial ditch, or whether the bridge needed to restore the highway replaces an existing bridge or involves the construction of an original bridge.

There are three analogous cases,⁽³⁸⁵⁾ none of which involved a constitutional question, which point up the fact that the primary responsibility for all costs incident to drainage work falls on the district doing the work regardless of the fact that such work may be done in territory under the control of another governmental unit. In each of these cases a drainage district was making improvements in an adjacent drainage district for the benefit of its own lands and in so doing removed bridges in the adjacent district. The results were uniform, the courts holding that the cost of replacing the bridges should be borne by the landowners directly benefiting from the drainage improvements.

2. Provisions Contained in Drainage Code

Section 12-4 of the 1955 Drainage Code⁽³⁸⁶⁾ points out the requirements pertinent to the construction and rebuilding of bridges across artificial and natural watercourses. This section provides:

Whenever a district drain crosses a public highway or a railroad other than in the course of natural drainage, the district is liable to the highway authority or the railroad for the cost of constructing any bridge or culvert made necessary by such crossing and shall thereafter be liable to the highway authority or railroad for the cost of repairing and maintaining such a bridge or culvert.

Whenever a natural drain or a ditch constructed in the course of natural drainage crosses a public highway or a railroad, the highway authority or the railroad shall construct and thereafter keep in repair and maintain a bridge or culvert of sufficient length, depth, height above the bed of the drain or ditch, and capacity to subserve the needs of the public with respect to the drainage of the lands within the natural watershed of such drain or ditch, not only as such needs exist at the time of construction, but for all future time. . . .

If a district, by deepening, widening or straightening a natural drain or by changing the established grade, width or alignment of a ditch, removes or threatens to remove the support from under any abutment, pier, wingwall or other supporting member of a highway or railroad bridge the district is liable to the highway

authority or the railroad for the cost of protecting or underpinning such abutment, pier, wingwall or other supporting member. . . .

The law as stated in the code pertaining to highways crossing drains constructed in the course of natural drainage appears to follow rules similar to those set forth in the original Farm Drainage Act and Levee Act, even though those acts were declared unconstitutional when they attempted to impose a duty upon the highway authority to build bridges across natural drains or ditches constructed in natural drains. Nevertheless, the code specifically states that the highway authority has the responsibility for constructing bridges whenever a natural drain or a ditch constructed in the course of natural drainage crosses a public highway.

At this time it is hard to tell whether the last paragraph of section 12-4 abrogates the statutory duty of the highway authority to restore a bridge over a natural drain when it has been destroyed or removed by the drainage district in the course of its work. In the light of the language of the second paragraph extending that duty "for all future time," it can be argued that the highway authority must foresee the drainage needs of the particular area for eternity and construct its bridge to accommodate those needs. On the other hand, perhaps this paragraph is intended to eliminate the constitutional objections found in the earlier cases by placing the responsibility of restoring a bridge on the district when it has made such construction necessary.

As to bridges crossing artificial ditches, the code points out that the drainage district is responsible when it has a drain crossing a public highway at a location other than in the natural course of drainage.

B. MAINTENANCE

1. Provisions Prior to Enactment of Drainage Code

With respect to maintenance of public bridges and culverts, the general rule propounded by the courts is that the duty falls upon the highway authority to maintain such bridges and culverts if the damage to them has arisen by virtue of public use.⁽³⁸⁷⁾ Implicit in the cases cited, and emphasized by way of dicta in one of them,⁽³⁸⁸⁾ is the rule that if the damage is caused by the work of the drainage commissioners, they will be responsible for the necessary repairs.

A brief examination of the cases will serve to

illustrate the rationale of the courts in determining the responsibility of bridge maintenance. Two cases before the courts in 1919⁽³⁸⁹⁾ and one in 1924⁽³⁹⁰⁾ involve demands by highway districts that bridges over *natural* drains be repaired by the respective drainage districts. Each time the courts refused the demands and required the highway commissioners to do the work. In *People v. Peeler*,⁽³⁹¹⁾ the Supreme Court said that there was no continuing duty on the drainage district to repair a bridge it had built when the damage thereto was caused by continued public use, nor could the drainage commissioners levy a tax to provide for such repairs.

A case in 1928⁽³⁹²⁾ and one in 1949⁽³⁹³⁾ arose out of requests by highway authorities for the repair of bridges over *artificial* ditches. In both of these cases the courts sustained the view that even with respect to bridges over artificial channels there was no duty on the drainage districts to perform maintenance. In *People ex rel. Kurtz v. Meyer*,⁽³⁹⁴⁾ the court said:

A bridge which has been built over a *natural* or an *artificial* channel to restore a public highway, and the highway is thereby restored, becomes a part of such public highway, and under the statute would necessarily pass under the control of the highway commissioner. . . . [Emphasis added.]

[I]t is true that the ditches referred to in the *Peeler* case, over which bridges were to be built or rebuilt, were located over natural depressions or watercourses, and that in this case the ditch in question is entirely artificial. . . . [I]n either case the bridge . . . becomes a part of the public road and passes under the control of the commissioner of highways.

The appellate court reversed the decision of the trial court and refused to compel the drainage commissioners to repair a portion of a public road damaged by normal public use.

In *City of Chicago v. Sanitary Dist. of Chicago*, decided in 1949,⁽³⁹⁵⁾ the Supreme Court was faced with the problem of construing a statute passed in 1915 which imposed the duty of maintenance of bridges, built by the district over its canals, upon the city. The trial court had ruled that the city must maintain only those bridges constructed after the passage of the law and that the sanitary district was responsible for maintaining those built before 1915. The high court held that the city was obligated to maintain all six of the structures involved, thereby rejecting the appellant city's argument that the digging of the canals created a maintenance problem outside the scope of its responsibility.

In the *Peeler* case,⁽³⁹⁶⁾ the constitutionality of

the mandate requiring the highway authority to maintain bridges over artificial ditches was put in issue. The court resolved the issue in favor of the drainage district by saying that the drainage commissioners were precluded from levying taxes for the purpose of fulfilling an obligation of the highway districts.

2. Provisions Contained in Drainage Code

The new Drainage Code states that the drainage commissioners are responsible for the cost of maintaining bridges over artificial ditches.

Whenever a district drain crosses a public highway or a railroad other than in the course of natural drainage, the district is liable to the highway authority or the railroad for the cost of constructing any bridge or culvert made necessary by such crossing and shall thereafter be liable to the highway authority or railroad for the cost of repairing and maintaining such a bridge or culvert.⁽³⁹⁷⁾

The act is apparently prospective in nature,⁽³⁹⁸⁾ making it fair to assume that bridges built across artificial ditches prior to January 1, 1956, would be maintained pursuant to the rule as it was developed through litigation up to that time.

As to the maintenance and repair of bridges and culverts crossing natural watercourses, the new statute points out that the obligation will remain on the highway authority.

C. LIABILITIES

Two questions left by the legislature to be answered by the common law are: (1) upon whom does liability rest for personal injuries or property damage incurred by third parties due to faulty construction; and (2) what liabilities exist between the drainage districts and highway districts for damages accruing to one because of acts of the other?

In a 1941 case,⁽³⁹⁹⁾ the Sanitary District of Chicago was a co-defendant with the City of Chicago and was held jointly liable to a third party for injuries the latter suffered when his automobile struck a bridge abutment. The street approaching each end of the bridge had been widened to 70 feet, while the bridge remained 23 feet wide. The bridge had been built by the Sanitary District, which had also placed safety reflectors on the abutments and "narrow bridge" signs on either approach; the city had maintained the structure otherwise.

The court stated that:

The evidence indicates that the sanitary district not only constructed and maintained [sic] the structure

which constituted a dangerous obstruction to the public highway, but that it also assumed the duty of keeping that part of the public highway safe. Under these circumstances the sanitary district . . . made itself liable. . . .

and further:

[A] third person or corporation using the public highway for any purpose, although exercising no jurisdiction over it, may nevertheless be held liable for his or its negligence, if any, which renders the highway unsafe. . . .⁽⁴⁰⁰⁾

In *Campbell v. City of Marseilles*,⁽⁴⁰¹⁾ the court held the city liable for injuries to a young boy who fell through a guard railing while playing on a bridge maintained in a faulty manner by the city. As indicated by these cases, common-law principles of fault will normally serve to determine liability of the respective municipal corporations for injuries suffered by third parties because of the way in which a bridge is constructed or maintained.⁽⁴⁰²⁾

It has been pointed out that a drainage district ordinarily is not liable for damages occasioned by the negligence of an independent contractor in executing a contract for work to be done for the district, but that an exception to this rule occurs when the damage is due to the defective plans pursuant to which the work is done.⁽⁴⁰³⁾ *People ex rel. Hepburn v. Maddox*⁽⁴⁰⁴⁾ illustrates the rule and this exception. There, in widening a stream, the contractors were following plans approved by a court; the court had been told by the commissioners at the hearing prior to such approval that no damage would be done to any bridge. The contractors were forced by heavy rains to halt their work 200 feet upstream from the bridge. In the course of a flood that followed, the bridge was washed away because of the cutting of the bank of the river. Even though the work had not progressed as far as the bridge, the defendant drainage district was held liable to the highway authority on the ground that the commissioners should have known that damage would occur if the plans were carried out.

There is dicta to the effect that a drainage district will not be held liable for faulty discretionary acts of its commissioners. The court, though not concerned with the construction or maintenance of bridges, held that even though the discretionary acts were not faulty or negligent but the ministerial duties performed by the commissioners pursuant to them were, the drainage district would be liable to third parties for damages arising from these acts.⁽⁴⁰⁵⁾

D. PRIVATE BRIDGES AND CULVERTS

Heretofore the discussion has been confined to liabilities arising out of the construction and maintenance of public bridges. However, whenever an open drain "crosses any privately owned enclosed tract or parcel of land in such a manner that a portion thereof is landlocked and has no access from any public highway other than by a bridge or passageway over the ditch,"⁽⁴⁰⁶⁾ the primary responsibility rests with the drainage district. That duty was imposed by the Farm Drainage Act of 1885 and has not been removed by subsequent legislation or judicial decision, although the manner in which the responsibility is carried out now varies. Depending upon when the ditch was constructed, when the district was organized, and whether the ditch is part of a natural drain, the responsibility may be either to construct the bridge or to compensate the landowner for the cost of construction.⁽⁴⁰⁷⁾

The only landowners' right that has been dele-

gated to the highway authorities for protection is the right of access to land from a highway over a ditch constructed by those authorities alongside the road. Section 9-105 of the Highway Code provides in part:⁽⁴⁰⁸⁾

In constructing a public highway, if a ditch is made at the junction of highways, or at the entrance of gates or other openings of adjoining premises, the highway authorities shall construct good and sufficient culverts or other convenient crossing. . . .

Only one case has been decided on this point: *Taylor v. Reed*,⁽⁴⁰⁹⁾ wherein the court found no difficulty in interpreting or enforcing the dictate of the statute and ordered the highway commissioners to construct culverts at places where the highway drains had deprived the plaintiff of his usual access. It should be noted, however, that a court will probably require a drainage district to build the necessary passage if it has built the drains along the highway; that was the holding in *Morgan v. Schusselle*.⁽⁴¹⁰⁾

VI. SEWAGE AND POLLUTION

A. EQUITABLE JURISDICTION IN POLLUTION CASES

Wherever there is drainage, natural or artificial, or water collected for any purpose, problems of contamination and pollution may arise. Such problems are normally resolved by way of an injunction, issued by a court of equity, which puts the perpetrator of the nuisance in danger of contempt of court proceedings if the condition continues to exist. Requests for this type of remedy may be made by any harmed party, either a private individual or a public official, but the granting of the requests is subject to different considerations, depending upon who instigates the proceedings.

1. Suits by Private Parties

In a suit by a private person, damage or an imminent threat of damage must be shown, and the damage must be of a type that threatens the health of the individual or his family and will necessarily result in the impairment of his enjoyment of his property.⁽⁴¹¹⁾ For example, in *Wahle v. Reinbach*,⁽⁴¹²⁾ an early Illinois case, the plaintiff sued to restrain his neighbor from erecting a privy in the vicinity of the former's well. In holding that an injunction should be issued, the court said:

[W]here the injury resulting from the nuisance is, in its nature, irreparable, as when loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property will ensue from the wrongful act or erection, courts of equity will interfere by injunction, in furtherance of justice and the violated rights of property.

Also, where an injury is of such constant and frequent occurrence that no fair or reasonable redress can be had for it in a court of law, it can be enjoined. On the other hand, a court of equity will not take cognizance of mere annoyances,⁽⁴¹³⁾ nor will it intervene where the presence of harm or the threat of harm is doubtful.⁽⁴¹⁴⁾ The Illinois Supreme Court made the last point clear when it said:

To entitle one to injunctive relief he must establish, as against the defendant, an actual and substantial injury

and not merely a technical inconsequential wrong entitling him to nominal damages, only.⁽⁴¹⁵⁾

If the above requirements are present, it is reasonable to assume that a private person may sue to enjoin a nuisance created by a governmental authority. It has been held in Illinois that a town would be restrained from discharging sewage onto a farmer's land,⁽⁴¹⁶⁾ and that damages would lie for a nuisance created by an overflow onto a plaintiff's land when a city altered the drainage of a street.⁽⁴¹⁷⁾ Thus, if a highway authority allowed a drain to become clogged and thereby caused an offensive condition, such as a stagnant pool that emitted foul odors and those odors hampered a landowner in the use of his property, the authority could probably be ordered to abate the condition at the suit of the landowner.

2. Suits by Municipal Authorities

An action to enjoin a nuisance may be brought by a public official when the damage or threat of damage is to the public welfare. Such an action is instituted for the general benefit of a community, and no impairment of private property rights need be involved.⁽⁴¹⁸⁾ In *Kenilworth Sanitarium v. Village of Kenilworth*,⁽⁴¹⁹⁾ the plaintiff village sought an injunction to prevent the sanitarium from emptying its sewage into a drainage ditch that flowed into the municipal water supply. The threat of disease forced the court to so order. The court stated that a watercourse used solely to drain away surface waters cannot be changed into a sewer without the consent of all the servient owners. Even if the servient owners should consent, equitable jurisdiction would be granted if there was an ensuing threat to the public health.

The language of the court in *Stead v. Fortner*⁽⁴²⁰⁾ states the law of public nuisance quite explicitly:

The public authorities have a right to institute the suit where the general public welfare demands it. . . . The maintenance of the public health, morals, safety and welfare is on a plane above mere pecuniary damage . . . and to say that a court of equity may not enjoin a public

nuisance because property rights are not involved, would be to say that the State is unable to enforce the law or protect its citizens from public wrongs.

That case arose out of the operation of several unlicensed taverns in the town of Shelbyville. The existence of an unlicensed dram shop was defined in a statute in effect at that time⁽⁴²¹⁾ as a public nuisance. Such a definition removes the burden of proving harm to the plaintiff. All that need be shown in order to obtain an injunction when a condition is statutorily set out as a public nuisance is that the alleged offense comes within the terms of the statute. Consequently, certain acts of pollution have been declared public nuisances under section 466 of the Criminal Code,⁽⁴²²⁾ which reads in part:

It is a public nuisance: . . . to throw or deposit any offal or other offensive matter, or the carcass of any dead animal, in any watercourse, lake, pond, spring, well or common sewer, street or public highway.

In addition to imposing criminal liability, the language would probably make a person amenable to equitable restraint for intentional acts, such as draining waterclosets into a public storm sewer or piping barnyard wastes directly into a highway drain. The main problem will be to show that the acts committed are of a nature that the legislature defined; once that is accomplished, an injunction should issue.

Magnitude is the key in a request for equitable intervention. Unless section 466 of the Criminal Code can be brought to bear on the situation, the pollution must be of sufficient magnitude to harm or offer a threat of harm to the enjoyment of property by a private individual. In the case of a public suit, it must be serious enough to threaten the general public welfare.

B. CRIMINAL JURISDICTION IN POLLUTION CASES

Two sanctions are available to help public authorities prevent contamination of waterways, lakes, and sewers. One is section 466 of the Criminal Code; the other is section 9-123 of the Highway Code.⁽⁴²³⁾ The primary purpose of these statutes is to act as deterrents, and it is apparent that most acts that cause any type of waste matter to be placed or discharged into highways or highway drains can be indicted under the provisions of one or the other of them.

1. Section 466 of the Criminal Code

The same requirements of proof will be necessary in a court of law to obtain a conviction under

this enactment as are necessary to cause a court of equity to issue an injunction: the acts complained of must be as defined by the legislature. Once that is shown, a fine not exceeding \$100 may be levied for the first offense, and the same fine plus confinement not exceeding three months in the county jail may be imposed for subsequent offenses.⁽⁴²⁴⁾

2. Section 9-123 of the Highway Code

The other sanction deals specifically with the pollution of street and highway drains. It reads as follows:

No person, firm, corporation, or institution, public or private, shall discharge or empty any type of sewage, including the effluent from septic tanks or other sewage treatment devices, or any other domestic, commercial or industrial waste, or any putrescible liquids, or cause the same to be discharged or emptied in any manner into open ditches along any public street or highway, or into any drain or drainage structure installed solely for street or highway drainage purposes.

Any person, firm, corporation, or institution, public or private, in violation of this Section, shall be fined not less than \$200 nor more than \$500 for each such offense and in addition shall be fined \$25 per day for each day such violation exists.

The highway authority having jurisdiction over the public street or highway affected by such violation shall enter a complaint in the proper court against any violator of this Section. Upon the failure of any such highway authority to so act, any other person, may in the name of political division or municipality, enter such complaint.⁽⁴²⁵⁾

This section has been in existence since 1913, and no case arising out of its provisions has yet been appealed. Thus even the simplest questions regarding the statute are difficult to answer.

The Attorney General of Illinois rendered an opinion in 1954⁽⁴²⁶⁾ that lends some certainty to the meaning of some of the language in section 9-123. The pertinent portions follow:

It will be noted that the prohibitions relate to (1) "any type of sewage," (2) "any other domestic, commercial or industrial waste," or (3) "any putrescible liquids."

The word "sewage" is defined in *Black's Law Dictionary*, 4th Edition, as follows: "Refuse and foul matter, solid or liquid, carried off by a sewer." It would thus seem clear that the term "sewage" includes the water carried human or animal waste matter from residences, buildings or other places.

The term "waste" is defined in *Webster's New International Dictionary*, as "refuse from places of human or animal habitation."

The word "putrescible" is defined in *Webster's New International Dictionary*, as "capable of putrefaction; liable to become putrid." The term "putrid" is further

defined as "decomposed, especially in an advanced stage of decomposition; rotten." . . .

It would seem to be the general purpose of this enactment to prohibit the discharge into the open ditches along any public street or highway, or into any drain or drainage structure for street or highway drainage purposes, of such substances as will be likely to create a nuisance or which will be detrimental or injurious to the public health, safety or welfare. In other words, the prohibitions relate to certain substances which are physically offensive to the senses.

In construing this statute in accordance with its general purpose and object, it would seem that water containing soap or detergents used in connection with shower baths or washing clothes would be "domestic waste" within the meaning and intent of the statute. . . .

Although seepage water [in this particular case water seeping out of a basement] may possibly be considered to be a form of domestic waste, and thus within the letter of the statute, yet it is clear that if it is nothing more than water containing no deleterious substance, it would not be physically offensive to the senses. Although thus possibly coming within the letter of the Act, it does not come within the general purpose and object of the Act. . . .

In respect to your third question relating to ordinary surface water, [carried off of a house by drainspouts] it

is my opinion that same does not come within the intention of the statute. . . .

The Attorney General pointed out that any waste matter, human, animal, or manufactured, that is physically offensive to the senses is included within the prohibition of the statute. But does that mean that a farmer who has manured or otherwise fertilized his fields must suffer a criminal penalty if some of the offensive material finds its way, in the course of natural run-off, into a highway ditch? And is the farmer whose barnyard borders on a road liable for the escape of waste matter into a highway drain?

A literal interpretation of the statute coupled with the Attorney General's opinion would lead to the conclusion that those landowners would be criminally liable for any discharge, no matter how small or from what source. Final interpretation of the statute rests in the Supreme Court of the state; and until an appropriate case is appealed to that bench, exactly what offenses constitute violations remains a question to be answered.

VII. LEGAL REMEDIES

The body of substantive law governing drainage in Illinois has been thoroughly reviewed in preceding sections of this study. If one of those rules is violated, the question arises as to the proper legal action to remedy the injury. It is the purpose of this section to discuss the remedies applicable to drainage violations. However, this brief analysis of legal remedies will touch only the surface and indicate only a few of the problems that are involved.

The two primary remedies are damages and injunction. These two modes of redress apply to both natural and statutory drainage violations. In at least one statutory section, damages and injunctive relief are expressly provided for;⁽⁴²⁷⁾ in other situations, these remedies are applied without express provision.⁽⁴²⁸⁾ In addition, certain statutory sections expressly provide for collection of a fine as the penalty for the specific violation⁽⁴²⁹⁾ or give the highway authority the right to fill certain ditches.⁽⁴³⁰⁾

A. DAMAGES

The term "damages" has been defined as a compensation, recompense, or satisfaction in money for a loss or injury sustained.⁽⁴³¹⁾ Subject to certain limitations to be discussed subsequently, damages are recoverable by parties who have been injured because of violation of a rule of natural drainage. For example, damages have been recovered when the violations involved diversion,⁽⁴³²⁾ obstruction,⁽⁴³³⁾ and overflow.⁽⁴³⁴⁾

Although the right to damages may be clear, problems are often encountered in measuring the extent of the damages. The general rules are well defined; it is their application that proves difficult. "General" or "nominal" damages are those implied or presumed by the law to have been sustained because of the legal wrong committed by the defendant. These are recoverable for any technical injury and therefore do not present a measurement problem. The court has stated that "every violation of a right imports some damage, and if none other be proved, the law allows nominal damages."⁽⁴³⁵⁾

Thus the plaintiff may recover a nominal sum (often \$1.00) for any technical invasion of a right, regardless of actual injury sustained.

"Special" or "substantial" damages, on the other hand, are those actually suffered.⁽⁴³⁶⁾ They are the ones that create measurement problems. Damages in this category are classified according to the type of injury sustained; the two classes are temporary and permanent, their names indicating their nature.

Permanent damages are those of a lasting or enduring nature. In an action for permanent damages, the plaintiff may recover not only present but future damages. Because both present and future damages are recoverable, such recovery bars all future actions by that plaintiff or any other person holding the property through him.⁽⁴³⁷⁾ Permanent damages are measured by the difference between fair market price before and after the injury.⁽⁴³⁸⁾

Where the injury is not of such lasting or enduring nature as to be termed "permanent," a different measure of damages is applicable. On the theory that the cause of the injury can be corrected, only those injuries sustained up to the commencement of the lawsuit may be recovered.⁽⁴³⁹⁾ Because only present damages are recoverable, successive causes of action may be brought. In a flooding situation where the defendant claimed that a previous recovery barred the present action, the court said:

There would be force in the argument if the injury caused by the construction of the drain went to the destruction of the entire estate. . . . Here, however, the damages are not so permanent and certain in their character as to enable a jury to give compensation at once for the entire injury. It is in the nature of a continuing nuisance, and in such cases successive actions may be brought and sustained as long as such nuisance shall be maintained.⁽⁴⁴⁰⁾

The measure of damages for temporary injuries is the cost to repair or restore the property to its condition prior to the injury plus an amount for the loss of use. The court has phrased this measure as "such sum as would put his property in as good condition as it was before it was injured by the flooding, together with compensation for any loss of

use during the time it was rendered unfit for occupation."⁽⁴⁴¹⁾

The damages recoverable for injuries to growing crops have been a source of controversy in Illinois decisions. The rule on the destruction of growing crops is clear; it is that "the measure of damages to growing crops which are not matured is the value of the crop as it was when destroyed. . . . [plus the value of] the right of the owner to mature and harvest it at the proper time."⁽⁴⁴²⁾ It is the means of arriving at this value that has been disputed.

One view holds that the value at the time of destruction is ascertained by approximating maturity value and deducting estimated future cultivation, harvesting, and marketing costs.⁽⁴⁴³⁾ Another view holds that the value at the time of destruction should be ascertained by estimating what the crop would have brought in its immature condition. This estimate would necessarily be based on soil condition and quality, nature of crop and probable yield, hazard of maturity, etc.⁽⁴⁴⁴⁾

A different measure is applicable to crops destroyed before they have come up or before they have reached a point where their unmaturing value is determinable. "When crops planted are destroyed before coming up, the measure of damages is the rental value of the land, the cost of the seed, and the value of the labor expended."⁽⁴⁴⁵⁾

Certain questions arise when the party seeking to bring an action is either a landlord or a tenant. A tenant clearly has the right to recover damages for injuries to crops during his period of tenancy.⁽⁴⁴⁶⁾ However, the tenant may not recover if the condition existed at the beginning of his tenancy and he had knowledge of the condition.⁽⁴⁴⁷⁾

In addition to the rights of the tenant, the landlord may have a cause of action. "[I]f a person interferes with the tenant so far as to disturb his enjoyment of the use of the premises and thereby cause loss of rent or damages to the landlord, he [the landlord] may have action."⁽⁴⁴⁸⁾

Just as the landlord-tenant relationship may affect the right of the particular party to bring an action, the grantor-grantee relationship may have a similar effect. An injury existing when land is transferred cannot be the basis for action by the grantee against the wrong-doer. The injury was to the grantor, and he is the proper party to bring the action.⁽⁴⁴⁹⁾ On the other hand, a grantee who comes into possession of land with a nuisance existing

upon it cannot be held liable until he has first been notified to remove the nuisance.⁽⁴⁵⁰⁾

B. INJUNCTION

The second of the two primary remedies for violation of rules of natural drainage is the injunction. An injunction is a judicial process whereby a party is required to do, or refrain from doing, a particular act.⁽⁴⁵¹⁾ In general, the remedy is a preventive one,⁽⁴⁵²⁾ and its usual purpose is to restrain.⁽⁴⁵³⁾

A quotation from a court opinion will best convey the prerequisites for the granting of an injunction. Note the need for the plaintiff to show facts and also the extreme caution with which the court acts:

To entitle a person to relief by injunction he must establish an actual and substantial injury, and not merely a technical or inconsequential wrong entitling him to nominal damages; and this is true whether the injury be single or continuous. The courts move with caution in granting any injunction. . . .⁽⁴⁵⁴⁾

It is clear that substantial and irreparable injury must be threatened.⁽⁴⁵⁵⁾ Conjectural apprehensions are not sufficient.⁽⁴⁵⁶⁾ Therefore, if it is not reasonably certain that injury will result, the issuance of an injunction will be denied.⁽⁴⁵⁷⁾

The foregoing discussion presupposes that an order to cease or not to begin (i.e., a negative order) will prevent or terminate the injury. There are situations, however, in which only a positive act by the defendant will adequately protect the plaintiff. Such a situation gives rise to the mandatory injunction, a device that commands the performance of some positive act. Because this type of order is difficult to supervise and control, the courts do not favor the mandatory injunction.⁽⁴⁵⁸⁾ Despite the reluctance of the courts, however, this remedy has been used to compel the return of water to its natural channel⁽⁴⁵⁹⁾ and to compel the removal of an obstruction from a natural watercourse.⁽⁴⁶⁰⁾

The first general rule is that an equitable remedy, such as an injunction, will not be granted when the plaintiff has another adequate remedy at law.⁽⁴⁶¹⁾ The meaning of the rule is that the plaintiff may not obtain an injunction if damages will adequately compensate him for his injury. The Supreme Court dealt with this principle as applied to the subject of drainage when it said:

It is true that to justify relief by injunction an actual and substantial injury must be shown . . . but this does not mean that the injury must necessarily be great in the

pecuniary loss involved or impossible of compensation in damages. When an owner of property is about to be deprived of a legal right in connection with it by the wrongful act of another for which there is no legal redress the act may be restrained by injunction, or, if it has already been executed, may be required to be undone, if this is practicable. The irreparable injury necessary to give a court of equity jurisdiction in such a case is not one so great as to be impossible of compensation but one of such a character that the law cannot give adequate compensation for it. The fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages, only, often furnishes the very best reason why a court of equity should interfere in a case where a nuisance is a continuous one.⁽⁴⁶²⁾

A second general rule is that an injunction will not be issued in equity until the existence of a nuisance has been established at law. The courts have long recognized, however, that strict application of this rule would provide a formidable barrier to adequate protection of property rights. The rule was substantially discredited in 1875 when the court said:

[T]o say that such a nuisance must be suffered to be created and continued until its character shall be formally determined at law, would seem to be but little better than a mockery of justice to him whose residence is affected by it.⁽⁴⁶³⁾

Because of this realistic attitude, injunctions are useful and effective remedies in the area of drainage litigation. They have seen frequent use in preventing diversion,⁽⁴⁶⁴⁾ obstruction,⁽⁴⁶⁵⁾ deposition of sewage,⁽⁴⁶⁶⁾ unlawful connection to a mutual drain,⁽⁴⁶⁷⁾ etc. In addition, since the rules of natural drainage are as applicable to highway authorities as to individuals, highway authorities have been the recipients of a portion of these injunctions.⁽⁴⁶⁸⁾

C. LIMITATIONS ON GRANTING OF DAMAGES AND INJUNCTION

The legal remedies discussed in the two preceding sections are not always applicable. There are certain principles that may prevent the granting of either remedy even though a drainage rule has been violated. For example, the plaintiff may not be entitled to the remedy he seeks because the time under the Statute of Limitations has run out⁽⁴⁶⁹⁾ or because the party he is suing cannot be made a defendant in a court of law or equity.⁽⁴⁷⁰⁾ Another limitation might involve the different degrees of liability placed upon a highway authority, depending upon whether a ministerial or a discretionary duty is performed.⁽⁴⁷¹⁾

VIII. REFERENCES CITED

Citations made to the legal material basically follow the form set forth in *A Uniform System of Citation*, 10th ed., 1958, Columbia Law Review, Harvard Law Review, University of Pennsylvania Law Review, Yale Law Review, published and distributed by the Harvard Law Review Association, Garnett House, Cambridge, Massachusetts.

A brief explanation may clarify the procedure:

1. Reference 3 is cited as follows: 93 *C.J.S.*, "Waters," sec. 114 (1956). Citation is made to Volume 93 of *Corpus Juris Secundum*, section 114 of the volume entitled "Waters" and the copyright date is 1956.

2. Reference 40 refers to *Gormley v. Sanford*, 52 *Ill.* 158 (1869). Citation is to the case of *Gromley v. Sanford* reported in Volume 52, *Illinois Supreme Court Reports*. The case starts on page 158 and the year it occurred was 1869.

If further information is desired on a particular point in a cited case, reference may be made to *Shepard's Citations to Cases and Statutes*, which will list other cases and sources of material relating to the point in question. Each reference is cited in full the first time it is used except for the authorities listed in the section below containing commonly used abbreviations. Subsequent references are identified by author name or an abbreviated title with a cross-reference in brackets (e.g., [Ref. 2]) to the original full citation.

ABBREVIATIONS

1. *Am. Jur.*.....*American Jurisprudence*
2. *A.L.R.*.....*American Law Reports*
3. *C. J.*.....*Corpus Juris*
4. *C.J.S.*.....*Corpus Juris Secundum*
5. *Ill.*.....*Illinois Supreme Court Reports*
6. *Ill. App.*.....*Illinois Appellate Court Reports*
7. *Ill. Const.*.....*Illinois Constitution*
8. *Ill. Ops. Att'y Gen.*.....*Illinois Opinions of the Attorney General*
9. *Ill. Rev. Stat.*.....*Illinois Revised Statutes*
10. *I.L.P.*.....*Illinois Law and Practice*
11. *Ky.*.....*Kentucky Reports*

12. *La. Civil Code*.....*Louisiana Civil Code*
13. *Mass.*.....*Massachusetts Reports*
14. *N.E.*.....*Northeastern Reporter*
15. *Ohio St.*.....*Ohio State Reports*
16. *S.W.*.....*Southwestern Reporter*

1. H. C. Black. *Black's Law Dictionary*. St. Paul, Minn.: West Publishing Co., 4th ed., 1951.
2. J. C. Thomson, "Surface Waters," *American Law Review*, Vol. 23 (1889), p. 372; S. V. Kinyon and R. C. McClure, "Interferences with Surface Waters," *Minnesota Law Review*, Vol. 24, No. 7 (1940), p. 891; 56 *Am. Jur.*, "Waters," sec. 69 (1947); H. P. Farnham, *The Law of Waters and Water Rights* (Vol. 3, sec. 889b). Rochester, N.Y.: The Lawyer's Cooperative Publishing Co., 1904. P. 2587.
3. 93 *C.J.S.*, "Waters," sec. 114 (1956). See also "Surface Water Law in Virginia," *Virginia Law Review*, Vol. 44, No. 1 (1958), p. 135.
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15. *Harward v. St. Clair & Monroe Levee & Drainage Co.*, 51 Ill. 130 (1869). The Constitutional clause referred to was Ill. Const. Art. IX, Sec. 5 (1848), now Ill. Const. Art. IX, Sec. 9 (1870).
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69. *Dettmer v. Illinois Term. R.R.* 287 Ill. 513, 123 N.E. 37 (1919); *Fenton & Thompson R.R. v. Adams*, 221 Ill. 201, 77 N.E. 531 (1906); *Daum v. Cooper*, 208 Ill. 391, 70 N.E. 339 (1904).
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88. Domat, p. 616. [Ref. 5]
89. Farnham, sec. 889a. [Ref. 2]
90. *La. Civil Code*, art. 660 (1961).
91. Farnham, sec. 882. [Ref. 2]
92. Farnham, secs. 890 and 891. [Ref. 2]
93. Farnham, sec. 891. [Ref. 2]
94. Farnham, sec. 889a. [Ref. 2]
95. S. V. Kinyon and R. C. McClure, p. 926. [Ref. 2]
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97. *Gormley v. Sanford*, 52 Ill. 158 (1869).
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100. *Peck v. Herrington*, 109 Ill. 611 (1884).
101. *Pinkstaff v. Steffy*, 216 Ill. 406, 75 N.E. 163 (1905).
102. *Mellor v. Pilgrim*, 3 Ill. App. 476 (1878).
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111. *Hicks v. Silliman*, 93 Ill. 255 (1879).
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- 271, 21 N.E. 198 (1889); *Peck v. Herrington*, 109 Ill. 611 (1884).
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119. *Ribordy v. Murray*, 177 Ill. 134, 52 N.E. 325 (1898).
120. *Kankakee & Seneca R.R. v. Horan*, 131 Ill. 288, 23 N.E. 621 (1890).
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126. *Leonard*, p. 14. [Ref. 84]
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131. *Comerford v. Morrison*, 145 Ill. App. 615 (1908).
132. *Dettmer v. Illinois Term. R.R.*, 287 Ill. 513, 123 N.E. 37 (1919).
133. *Daum v. Cooper*, 208 Ill. 391, 70 N.E. 339 (1904).
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140. *Young v. Commissioners of Highways*, 134 Ill. 569, 25 N.E. 689 (1890).
141. *Commissioners of Highways of Eldorado v. Foster*, 134 Ill. App. 520 (1907).
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144. *Young v. Commissioners of Highways*, 134 Ill. 569, 25 N.E. 689 (1890).
145. *Allen v. Michel*, 38 Ill. App. 313 (1890).
146. *Jewett v. Sweet*, 178 Ill. 96, 52 N.E. 962 (1899).
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148. *Dettmer v. Illinois Term. R.R.*, 287 Ill. 513, 123 N.E. 37 (1919).
149. *Dayton v. Drainage Commissioners*, 128 Ill. 271, 21 N.E. 198 (1889); *Anderson v. Henderson*, 124 Ill. 164, 16 N.E. 232 (1888).
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157. *Commissioners of Highways of Pre-emption v. Whitsitt*, 15 Ill. App. 318 (1884); *Peck v. Herrington*, 109 Ill. 611 (1884).
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171. *Gough v. Goble*, 2 Ill. 2d 577, 119 N.E. 2d 252 (1954).
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211. *Town of Canoe Creek v. McEniry*, 23 Ill. App. 227 (1886). See also *Chaplin v. Highway Commissioners of The Town of Wheatland*, 129 Ill. 651, 22 N.E. 484 (1889).
212. See *Euziere v. Highway Commissioners of Town of Rockville*, 346 Ill. 131, 178 N.E. 397 (1931); *Chaplin v. Highway Commissioners of The Town of Wheatland*, 129 Ill. 651, 22 N.E. 484 (1889).
213. Ill. Rev. Stat., ch. 121, sec. 2-213 (1961).
214. See Ill. Rev. Stat., ch. 121, secs. 9-107 and 9-117 (1961).
215. Ill. Rev. Stat., ch. 121, secs. 4-502, 5-802, and 6-802 (1961).
216. See "Revision of 1959," *Smith-Hurd Illinois Annotated Statutes*, ch. 121, sec. 9-117 (1960).
217. *Stephens v. Chicago, B. & Q. R.R.*, 303 Ill. 49, 135 N.E. 68 (1922).
218. *Commissioners of Highways of Eldorado v. Foster*, 134 Ill. App. 520 (1907); *Young v. Commissioners of Highways of Maquon Twp.*, 134 Ill. 569, 25 N.E. 689 (1890).
219. *Simpson v. Wright*, 21 Ill. App. 67 (1836).
220. In ch. 121, Ill. Rev. Stat. (1961), sec. 4-502 grants authority to the department, sec. 5-802 to the county, and sec. 6-802 to the township. The wording of the three is identical except that the proper authority appears where "highway authority" is used in the quotation. Secs. 5-802 and 6-802 also include a clause providing for the acquisition of materials by eminent domain.
221. *Illinois Laws 1883*, sec. 8, p. 139; *Illinois Laws 1913*, sec. 133, p. 569.
222. "Private property shall not be taken or damaged for public use without just compensation." Ill. Const., Art. II, Sec. 13 (1870).
223. *Chaplin v. Highway Commissioners of The Town of Wheatland*, 129 Ill. 651, 22 N.E. 484 (1889).
224. Ill. Rev. Stat., ch. 121, secs. 4-502, 5-802, 6-802 (1961).
225. *Illinois Laws 1883*, sec. 8, p. 139.
226. *Chaplin v. Highway Commissioners of The Town of Wheatland*, 129 Ill. 651, 22 N.E. 484 (1889).
227. *Baughman v. Heinselman*, 180 Ill. 251, 54 N.E. 313 (1899).
228. *Young v. Commissioners of Highways of Maquon Twp.*, 134 Ill. 569, 25 N.E. 689 (1890).
229. *Baughman v. Heinselman*, 180 Ill. 251, 54 N.E. 313 (1899).
230. *Dierks v. Commissioners of Highways of Twp. of Addison*, 142 Ill. 197, 31 N.E. 496 (1892).
231. *Tearney v. Smith*, 86 Ill. 391 (1879).
232. Ill. Rev. Stat., ch. 121 (1961), sec. 4-503 grants authority to the department, sec. 5-803 to the county, and sec. 6-803 to the township.
233. Ill. Rev. Stat., ch. 121, sec. 9-107 (1961).
234. *Davis v. Commissioners of Highways*, 143 Ill. 9, 33 N.E. 58 (1892).
235. *Dunn v. Youmans*, 224 Ill. 34, 79 N.E. 321 (1906).
236. *Davidson v. Sprague*, 21 Ill. App. 611 (1886).
237. *Township of Whitley v. Linville*, 174 Ill. 579, 51 N.E. 832 (1898).
238. *Johnson v. RCA*, 12 Ill. App. 331 (1882). See also Ill. Ops. Att'y Gen. (1925), p. 31.
239. *Tacoma Safety Deposit Co. v. City of Chicago*, 247 Ill. 192, 93 N.E. 153 (1910); *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 49 N.E. 365 (1897); *Town of Palatine v. Kreuger*, 121 Ill. 72, 12 N.E. 75 (1887); *Town of Old Town v. Dooley*, 81 Ill. 255 (1876).
240. *Murray v. Gibson*, 21 Ill. App. 488 (1886). See also *Minnie Creek Drainage Dist. v. Wagner*, 327 Ill. 236, 158 N.E. 383 (1927).
241. Ill. Rev. Stat., ch. 121, sec. 9-117 (1961).
242. *Town of Brown v. Barrett*, 38 Ill. App. 248 (1890).
243. *Seidschlag v. Town of Antioch*, 207 Ill. 280, 69 N.E. 949 (1904); *Township of Madison v. Gallagher*, 159 Ill. 105, 42 N.E. 316 (1895).
244. *Davis v. Commissioners of Highways*, 143 Ill. 9, 33 N.E. 58 (1892).
245. *Tacoma Safety Deposit Co. v. City of Chicago*, 247 Ill. 192, 93 N.E. 153 (1910); *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 49 N.E. 365 (1897); *Town of Palatine v. Kreuger*, 121 Ill. 72, 12 N.E. 75 (1887); *Town of Old Town v. Dooley*, 81 Ill. 255 (1876).
246. Ill. Rev. Stat., ch. 121, sec. 4-501 (1961). Secs. 5-801 and 6-801 are substantially the same.
247. Ill. Rev. Stat., ch. 121, secs. 4-502, 5-802, and 6-802 (1961).

248. *Town of Canoe Creek v. McEniry*, 23 Ill. App. 227 (1886). See also *Simpson v. Adkins*, 386 Ill. 64, 53 N.E. 2d 979 (1944); *Boyd v. Town of Farm Ridge*, 103 Ill. 408 (1882).
249. *Nelson v. Fehd*, 203 Ill. 120, 67 N.E. 828 (1903). See also *Town of Hudson v. Carithers*, 201 Ill. App. 153 (1916).
250. In ch. 121, Ill. Rev. Stat. (1961), sec. 4-405 applies to the department, sec. 5-401 to the county, and sec. 6-201.7 to the township.
251. Ill. Rev. Stat., ch. 121, sec. 6-401 (1961).
252. Ill. Rev. Stat., ch. 121, sec. 9-107 (1961).
253. Ill. Rev. Stat., ch. 121, sec. 2-202 (1961).
254. *Henline v. Stack*, 48 Ill. App. 67 (1892).
255. In ch. 121, Ill. Rev. Stat. (1961), sec. 4-214 applies to the department, sec. 5-101.8 to the county, and sec. 6-328 to the township.
256. Ill. Rev. Stat., ch. 121, sec. 9-108 (1961).
257. Ill. Rev. Stat., ch. 121, sec. 9-115 (1961).
258. In ch. 42, Ill. Rev. Stat. (1961), secs. dealing either with technicalities or with subjects not of immediate concern in which highways or highway authorities are specifically mentioned include secs. 3-6, 4-22, 5-3, 5-6, 5-18, and 6-4. Other code secs. excluded involve other types of districts (secs. 3-27, 3-28, and 3-31) and repair and maintenance (sec. 4-15).
259. J. E. Cribbet, *Illinois Water Rights Law*, Water Resources Committee, Illinois State Chamber of Commerce, Chicago, 1958, p. 21.
260. Hannah, p. 13. [Ref. 84]
261. Ill. Const., Art. IX, Sec. 3 (1870).
262. *Krause v. Peoria Housing Authority*, 370 Ill. 356, 19 N.E. 2d 193 (1939); *People ex rel. Olmsted v. University of Illinois*, 328 Ill. 377, 159 N.E. 811 (1927).
263. Ill. Rev. Stat., ch. 120, sec. 500(5) (1961).
264. Ill. Const., Art. IV, Sec. 26 (1870).
265. In re *City of Mt. Vernon*, 147 Ill. 359, 35 N.E. 533 (1893).
266. Ill. Rev. Stat., ch. 42, sec. 5-2 (1961).
267. *People ex rel. Speck v. Peeler*, 290 Ill. 451, 125 N.E. 306 (1919); *Hadley Creek Sub-Dist. v. Chicago B. & Q. R.R.*, 284 Ill. 354, 120 N.E. 281 (1918); *Shabbona Special Drainage Dist. v. Town of Cornwall*, 281 Ill. 551, 117 N.E. 990 (1917); *People ex rel. Boisvert v. Magruder*, 237 Ill. 340, 86 N.E. 615 (1908).
- Note that these cases include the various minor types of districts dealt with in the Drainage Code (Ill. Rev. Stat., ch. 42) secs. 3-27, 3-28, and 3-31.
268. *Vandalia Levee & Drainage Dist. v. Vandalia R.R.*, 247 Ill. 114, 93 N.E. 53 (1910). See also *Commissioners of Highways of Town of Colfax v. Commissioners of East Lake Fork Special Drainage Dist.*, 127 Ill. 581, 21 N.E. 206 (1889).
269. In re *City of Mt. Vernon*, 147 Ill. 359, 35 N.E. 533 (1893).
270. Ill. Rev. Stat., ch. 42, sec. 3-23 (1961).
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272. *Vandalia Levee & Drainage Dist. v. Vandalia R.R.*, 247 Ill. 114, 93 N.E. 53 (1910). See also *Commissioners of Town of Colfax v. Commissioners of East Lake Fork Special Drainage Dist.*, 127 Ill. 581, 21 N.E. 206 (1889).
273. *People ex rel. Mann v. Allen*, 330 Ill. 433, 161 N.E. 867 (1928).
274. *People ex rel. Mann v. Allen*, 330 Ill. 433, 161 N.E. 867 (1928).
275. *Minnie Creek Drainage Dist. v. Nation*, 315 Ill. 332, 146 N.E. 558 (1925).
276. Ill. Rev. Stat., ch. 42, sec. 4-14 (1961).
277. *Moore v. Gar Creek Drainage Dist.*, 266 Ill. 399, 107 N.E. 642 (1915).
278. Ill. Rev. Stat., ch. 42, sec. 4-17 (1961).
279. *Heffner v. Cass & Morgan Counties*, 193 Ill. 439, 62 N.E. 201 (1901).
280. Ill. Rev. Stat., ch. 42, sec. 8-2 (1961).
281. Ill. Rev. Stat., ch. 42, sec. 8-3 (1961).
282. *People ex rel. Caldwell v. Wildcat Drainage Dist.*, 181 Ill. 177, 54 N.E. 923 (1899). See also *Minnie Creek Drainage Dist. v. Streeter*, 327 Ill. 236, 158 N.E. 383 (1927); *Gar Creek Drainage Dist. v. Wagner*, 256 Ill. 338, 100 N.E. 190 (1912).
283. *People ex rel. Wilcox v. Barber*, 265 Ill. 316, 106 N.E. 798 (1914).
284. Ill. Rev. Stat., ch. 42, sec. 12-1 (1961).
285. Ill. Rev. Stat., ch. 42, sec. 12-2 (1961).
286. *Turley v. Arnold*, 384 Ill. 158, 51 N.E. 2d 176 (1943).
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289. Ill. Rev. Stat., ch. 42, sec. 12-7 (1961).

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291. *Ill. Rev. Stat.*, ch. 42, sec. 12-9 (1961).
292. *Ill. Rev. Stat.*, ch. 121, sec. 9-107 (1961).
293. *Davis v. Commissioners of Highways*, 143 Ill. 9, 33 N.E. 58 (1892).
294. *Ill. Rev. Stat.*, ch. 121, sec. 9-117 (1961).
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296. *Ill. Rev. Stat.*, ch. 121, sec. 9-117 (1961).
297. *Nelson v. Fehd*, 203 Ill. 120, 67 N.E. 828 (1903). See also *Town of Hudson v. Carithers*, 201 Ill. App. 153 (1916).
298. *Davis v. Commissioners of Highways*, 143 Ill. 9, 33 N.E. 58 (1892).
299. *Ill. Rev. Stat.*, ch. 121, sec. 9-117 (1961).
300. *Ill. Rev. Stat.*, ch. 121, sec. 4-209 (1961).
301. *Ill. Rev. Stat.*, ch. 121, sec. 9-115 (1961).
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305. *Ill. Rev. Stat.*, ch. 42, sec. 2-5 (1961).
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308. *Chronic v. Pugh*, 136 Ill. 539, 27 N.E. 415 (1891).
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311. *Ill. Rev. Stat.*, ch. 42, sec. 2-4 (1961).
312. *Chronic v. Pugh*, 136 Ill. 539, 27 N.E. 415 (1891).
313. *Illinois Laws 1885*, sec. 6, p. 79.
314. *Illinois Laws 1885*, sec. 5, p. 79.
315. *Ill. Rev. Stat.*, ch. 42, sec. 2-2 (1961).
316. *Ill. Rev. Stat.*, ch. 42, sec. 2-5 (1961).
317. *Ill. Rev. Stat.*, ch. 42, secs. 2-8 through 2-11 (1961).
318. *Wilson v. Bondurant*, 142 Ill. 645, 32 N.E. 498 (1892). See also *Knudson v. Neal*, 320 Ill. 136, 150 N.E. 626 (1926); *King v. Manning*, 305 Ill. 31, 136 N.E. 730 (1922); *Adams v. Abel*, 290 Ill. 496, 125 N.E. 320 (1920); *Cox v. Deverick*, 272 Ill. 46, 111 N.E. 560 (1916); *Helm v. Richmond*, 72 Ill. App. 516 (1897).
319. *Johnson v. Cunningham*, 56 Ill. App. 593 (1895).
320. *Mackey v. Wrench*, 134 Ill. App. 587 (1907).
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330. 37 C.J.S., "Frauds, Statute of," sec. 1 (1943).
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336. See *Hunt v. Sain*, 181 Ill. 372 (1899).
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IX. INDEX

- ACCELERATION
as required by good husbandry, 23
collection, 22
injury caused by, 23
of water into established streams, 23
permissibility of, 21
- ACQUIESCENCE
definition, 6
mutual license, 44, 45
- ACQUISITION OF PROPERTY
highway authority, 33
drainage district, 39
- ACT OF GOD, 29
- ADJACENT LANDS, 15
- ALTERATION OF WATERCOURSE, 24
- ANNEXATION OF LAND — DRAINAGE DISTRICTS, 39
- APPLICATION OF PRESCRIPTIVE RIGHTS, 31
- ARTIFICIAL DRAINAGE, 15
- ARTIFICIAL WATERCOURSE
definition, 6
origin, 16
qualifications, 17
uses of, 17
- ASSESSMENT
benefit, 38
exemptions, 37
highways, 37
- BARRIERS, NATURAL, 26
- BASIN, 6, 22
- BOND, 41, 42
- BRIDGE AND CULVERT CONSTRUCTION
artificial watercourse, 49
natural watercourse, 49
prior to drainage code, 48
private, 52
provisions in drainage code, 49
- BRIDGE AND CULVERT MAINTENANCE
artificial watercourse, 50
natural watercourse, 50
prior to drainage code, 50
private, 52
provisions in drainage code, 51
- BURDEN OF RECEIVING WATER, 26
- CHANNEL WATERS, 16
- CIVIL LAW RULE, 10, 28, 29, 30
- CLASSIFICATION OF WATER, 15
- CODE NAPOLEON, 11
- COLLECTION OF SURFACE WATER, 18, 22
- COMMON ENEMY RULE, 6, 10, 11
- COMMON LAW, 6, 10, 14
- COMMON LAW RULE, 10, 14
- CONDEMNATION, 6, 33, 39
- CONNECTION INTO DRAINAGE SYSTEM
highway draining onto landowners' property, 34
landowner connecting into highway system, 34, 35
mutual drain, 45
- CONSENT, 25, 34, 39, 43, 45
- CONSTRUCTION, BRIDGES AND CULVERTS
provisions contained in drainage code, 49
provisions prior to enactment of drainage code, 48
- CONSTRUCTION, COVERED DRAINS THROUGH LAND OF OTHERS, 41
- CONSTRUCTION OF DRAINAGE DITCHES WITHIN RIGHT OF WAY LIMITS, 35
- CONTAMINATION OF WATERWAYS, LAKES, AND SEWERS, 54
- CONTINENTAL CIVIL LAW, 10
- CONTINUOUS FLOWING CHANNEL, 16
- CONTRACTS
connect into highway tile, 34, 40
drain onto adjoining land, 34
- COVERED DRAINS EXTENSION
appeal, 42
applicability, 42
bond, extension covered drain, 41
bond and plat, 42
construction and maintenance, 41
plat and profile, 41
- CRIMINAL CODE, 54
- CROP DAMAGES, 57
- CULVERTS (*see also* BRIDGE), 48
- CUTTING OR DAMAGING STATE HIGHWAYS, 41
- DAMAGES FOR INJURY
award of, 33, 42
definition, 56
general, 56
limitations, 58
measurement, 56
nominal, 56
permanent, 56
special, 56
substantial, 56
temporary, 56
- DEPOSIT OF SPOIL, 37, 41
- DICTA, 6
- DIFFUSED SURFACE WATER, 11, 19, 35
- DISCHARGE, POINT OF, 17, 24
- DITCH
definition, 6
district, 37
maintenance, 32, 36, 41, 46
necessity, 36
obstruction to highway, 36
- DIVERSION
as related to highway and agricultural drainage, 25
definition, 6, 24
insufficient channel, 26
natural barriers, 26
point of discharge, 24
right of — by prescription, 26
- DOMAT'S WORK, *The Civil Law in Its Natural Order*, 10
- DOMINANT ESTATE OR TENEMENT, 6, 30
- DOMINANT HERITAGE, 15, 26, 27
- DOMINANT LAND, DEFINED, 6
- DRAIN, DEFINED, 6
- DRAINAGE, CHANNELS, 17
- DRAINAGE CODE, 14, 33, 37, 45, 46
- DRAINAGE, COMMON LAW, 10
- DRAINAGE DISTRICTS
annexation of lands to, 39
assessment of highways, 37
common law rights, 40
Drainage Code, 1955, 37
eminent domain, 39
Farm Drainage Act, 13, 37
Levee Act, 13, 37
organization and operation, 37
rights of landowners within, 40
use of highways by, 38
- DRAINAGE OBLIGATIONS, 30
- DRAINAGE, STATUTORY LAW, 13, 14, 33
- DRAINAGE STRUCTURES, 6
- DRAINAGE SYSTEM, 6
- DRAINS, EXTENSION OF, 41
- DRAINS AND LEVEES FOR MUTUAL BENEFIT
connection by third party, 45
drains included, 44
duration, 46
original tract divided, 45
parol license and acquiescence, 44
parties included, 43
purpose, 43
repair and maintenance, 46
revocation of license, 44
Statute of Frauds, 44
- DRAINWAYS, 17

EASEMENT

- definition, 7, 30
- maintenance, 32
- natural, 10, 30
- parol license, 32
- perpetual, 46
- prescription, 31

EMINENT DOMAIN

- acquisition of property, 33
- constitutionality and procedure, 33
- definition, 7
- determination of necessity, 34
- direction of flow, 34
- drainage district, 39
- entry on lands to make survey, 34
- highway authority, 33, 36
- limitations, 34
- use by drainage district against highway authority, 39

ENTRY ON LANDS TO MAKE SURVEY, 34

EQUITY, 7

EXTENSION OF COVERED DRAINS THROUGH

LAND OF OTHERS

- abandonment of proceedings, 41
- appeal, 42
- applicability, 42
- bond, 41
- bond and plat, 42
- constitutionality, 42
- construction and maintenance, 41
- plat and profile, 41
- statutory provisions, 41
- trial and judgment, 41

FARM DRAINAGE ACT OF 1879, 13, 37

FARM DRAINAGE ACT OF 1885, 13, 23, 37

FEE SIMPLE TITLE, 36

FLOOD WATERS, 16

FLOW, LEGAL INCREASE, 22, 24

FRAUDS, STATUTE OF, 44

FRENCH CIVIL CODE, 11, 19, 20

GENERAL DAMAGES, 56

GOOD HUSBANDRY, 22, 23, 25, 30

HERITAGE, 7

HIGHWAY

- assessments of, 37
- bridge and culvert construction, 48
- bridge and culvert maintenance, 50
- cutting or damaging, 41
- definition, 7
- eminent domain, 33, 36
- injuring or obstructing, 35, 40
- maintenance and repair of — drainage system, 36
- pollution of, 54
- recording of plats, 37
- use of, by drainage districts, 38
- willow hedges as a public nuisance, 37

HIGHWAY AUTHORITY

- definition, 7
- drainage obligations, 30
- same rights as private owners, 14, 15, 29, 33

HIGHWAY CODE, 1959, 14, 33, 36, 54

HIGHWAY COMMISSIONERS, 33

HIGHWAY EMBANKMENT OPENING, 29

HISTORICAL REVIEW OF DRAINAGE LAW, 10

HUSBANDRY, GOOD, 22, 23, 25, 30

IMMUNITY, PRESCRIPTIVE RIGHTS, 31

INCREASE FLOW, PROVISIONS, 22, 23

INDIVIDUAL LANDOWNER

- contract with highway authority, 40
- cutting or damaging highways, 41
- injuring or obstructing highway, 40
- permission to drain into highway, 40
- rights of — within drainage districts, 40

INJUNCTION

- definition, 7
- equitable remedy, 57
- limitations, 58
- mandatory, 29, 57
- uses of, 57

INJURING OR OBSTRUCTING HIGHWAYS

- by individual landowner, 40
- by turning a current of water, 35
- ditch as an obstruction, 36
- necessity for ditch, 36
- notice, 35
- statutory provision, 35

INJURY CAUSED BY ACCELERATION, 23

INSUFFICIENT CHANNEL, 26

INTERMITTENT FLOWING CHANNELS, 16

LANDOWNER

- definition, 7
- drainage obligations, 30
- use of right of way, 40

LANDS, ANNEXATION OF, 39

LATERAL SUPPORT, 37, 41

LEGAL CLASSIFICATION OF WATER, 15

LEGAL REMEDIES

- damages, 56
- injunction, 57

LEEVE, 30

LEEVE ACT OF 1879, 13, 37

LIABILITIES

- bridges and culverts, 51
- discharge of sewage, 55
- private bridges and culverts, 52

LICENSE, 32, 35

LICENSE, PAROL, 32, 44

LICENSE, REVOCATION OF FOR MUTUAL DRAINS, 44

LOCAL RIGHTS, 31

LOUISIANA CIVIL CODE, 11, 19, 20

MAINTENANCE

- bridges and culverts, 50
- ditch adjacent to highway, 36
- extension of covered drains, 41
- mutual drains and levees, 46
- owner of easement, 32

MANDATORY INJUNCTION, 29, 57

MEASURE OF DAMAGES, 56

MUTUAL BENEFIT, DRAINS AND LEVEES

- connection by third party, 45
- drains included, 44
- duration, 46
- original tract divided, 45
- parol license and acquiescence, 44
- parties, 43
- purpose, 43
- repair and maintenance, 46
- revocation of license, 44
- Statute of Frauds, 44

MUTUAL DRAINAGE SYSTEM, 43

NATURAL BARRIERS, 26

NATURAL DRAINAGE, 9

NATURAL DRAINAGE CHANNEL, 17

NATURAL DRAINAGE RULE

- adoption in Illinois, 11, 15
- application, 15
- basic principles, 10, 15
- continuous flowing channels, 16
- definition, 7
- inadequacies, 11
- intermittent flowing channels, 16
- statutory enlargement, 12

NATURAL EASEMENT, 10, 21, 30, 44

NATURAL FLOW

- obstruction, 28
- overflow, 29
- surface water, 21

NATURAL WATERCOURSE

- definition, 7, 16
- effects of maintenance, 17

NOMINAL DAMAGES, 56

OBSTRUCTION

- ditch, 36
- highways, 35, 40
- Illinois rule, 28
- notice, 35
- of natural flow, 11, 28
- provision for sufficient opening, 29

OVERFLOW

- natural flow, 29
- obligations of highway authorities and adjoining landowners, 30

OX-BOW LOOP, 23

PAROL, 7

PAROL LICENSE, 32, 44

PENALTIES FOR INJURING A DRAIN, 40

PERCOLATING WATERS, 16

- PERJURY, 44
- PERMANENT DAMAGES, 56
- PERPETUAL EASEMENT, 46
- PETITION FOR ANNEXATION OF LAND, 39
- PLATS, RECORDING OF, 37, 41, 42
- POINT OF DISCHARGE, 24, 27
- POLLUTION, 53
- POLLUTION CASES, CRIMINAL JURISDICTION
 - Criminal Code, 54
 - Highway Code, 54
 - Illinois Attorney General's opinion, 54, 55
- POLLUTION CASES, EQUITABLE JURISDICTION
 - suits by municipal authorities, 53
 - suits by private parties, 53
- PONDED AREAS
 - application of drainage principles, 27
 - drainage of, 26
 - point of discharge, 27
 - pond size, 27
 - removal of pond barrier, 27
- PRESCRIPTION
 - application, 31, 33
 - diversion, 26
 - elements of, 31
 - immunity from, 31
- PRESCRIPTIVE RIGHTS, 7
- PRIVATE BRIDGES AND CULVERTS, 52
- PRIVATE CHARTERED DRAINAGE COMPANIES, 11
- PRIVATE RIGHTS, 31
- PROPERTY ACQUISITION, 33
- PROPERTY RIGHTS, 32
- PROPRIETOR, 7
- PUBLIC NUISANCE, WILLOW HEDGES, 37
- PUBLIC RIGHTS, 31
- QUASI-CORPORATIONS, 7, 42
- RAILROADS, 21, 22, 23, 26, 29
- REASONABLE USE RULE, 11
- RECORDING OF PLATS, 37, 41, 42
- REGULATED COURSES, 11, 19
- REMEDIES, LEGAL
 - damages, 46, 56
 - injunction, 46, 57
 - unlawful connection, 46
- REMOVAL OF NATURAL BARRIER, 27
- REPAIR, MUTUAL DRAINS, 46
- REVENUE ACT, 37
- RIGHT OF WAY, ACQUISITION OF, 33
- RIGHT OF WAY, LANDOWNER USE OF, 40
- RIM, POND, 27
- RIPARIAN RIGHTS, 17, 19
- SERVIENT LAND, TENEMENT, 8, 30
- SEWAGE
 - criminal jurisdiction, 54
 - definition, 54
 - discharge into highway facilities, 55
 - eminent domain limitation, 34
 - equitable jurisdiction, 53
 - liability, 55
 - suits by municipal authorities, 53
 - suits by private parties, 53
- SIZE, POND, 27
- SLOUGH, 17
- SPECIAL DAMAGES, 56
- SPOIL, DEPOSIT OF, 37
- Stare decisis*, 10
- STATUTE OF FRAUDS, 44
- STATUTE OF LIMITATIONS, 8, 32
- STATUTORY DRAINAGE
 - contracts under statutory provisions, 34
 - development, 13
 - drainage districts, 37
 - drains and levees for mutual benefit, 43
 - enlargement of natural drainage law, 9, 12
 - extension of covered drains, 41
 - highway authority, 33
 - individual landowner, 40
- STATUTORY LAW
 - definition, 8
 - drainage law, 10, 13, 15
- SUBSTANTIAL DAMAGES, 56
- SUFFICIENT OPENINGS, 29
- SURFACE WATERS
 - classification of, 16
 - collection of, 22
 - definition, 8, 18
 - diffused, 19
 - discharge over natural surface, 22
 - drainage rule, governing, 16
 - natural flow of, rights to, 21
 - provisions for increase in flow, 22
 - watercourse, use of, 21
- SURVEYS, ENTRY ON LANDS FOR, 34
- SWAMP LAND ACT, 11, 12
- TAXATION, 12, 37
- TEMPORARY DAMAGES, 56
- WASTE, DEFINITION, 54
- WATERCOURSES
 - alteration, 24
 - artificial, 17
 - definition, 16
 - drainage of surface waters, 21
 - natural, 16
- WATER, LEGAL CLASSIFICATION OF, 15
- WATER MOVEMENTS, 18
- WILLOW HEDGES, PUBLIC NUISANCE, 37
- WRIT OF MANDAMUS, 8, 49

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